

No. 11759

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

FEB - 4 1943

PAUL P. O'BRIEN. CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

JAMES M. CARTER

United States Attorney

RONALD WALKER

CAMERON L. LILLIE

Assistants U. S. Attorney

600 Post Office and Court House Building
Los Angeles 12, Calif.

For Appellees:

JAMES V. BREWER

548 South Spring Street

Los Angeles 13, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 6074-O'C

UNITED STATES OF AMERICA,

Plaintiff,

v.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Defendants.

COMPLAINT FOR DAMAGES

The United States of America, by James M. Carter, United States Attorney for the Southern District of California and Ronald Walker and Cameron L. Lillie, Assistant United States Attorneys for said district, alleges:

I.

That this action is brought in the above-entitled court pursuant to the provisions of Title 28, Section 41(1) U. S. C. A. by reason of the fact that the United States of America is named herein as plaintiff.

II.

That at all times herein mentioned the Los Angeles Municipal Airport was and now is located in the City of Inglewood, County of Los Angeles, State of California, within the Southern District of California, Central Division. [2]

III.

That at all times herein mentioned plaintiff was the owner of a certain P-51B airplane, Serial No. 43-12093; and that at all times herein mentioned said P-51B airplane was driven and operated by A. W. Pitcairn, and was engaged in official business of the United States of America.

IV.

That at all times herein mentioned defendant Douglas Aircraft Co., Inc., a California corporation, was the owner of a certain SBD-5 airplane, Serial No. 36528; said airplane was driven and operated by defendant Thomas W. Scott, with the consent and knowledge of defendant Douglas Aircraft Co. Inc., a California corporation.

V.

That on or about the 11th day of November, 1943, at the Los Angeles Municipal Airport in the City of Inglewood, County of Los Angeles, State of California, the defendant Thomas W. Scott did so carelessly, recklessly, negligently and in violation of law operate said SBD-5 airplane, Serial No. 36528, belonging to the defendant Douglas Aircraft Co. Inc., a California corporation, as to cause said airplane to collide with and damage the aforesaid P-51B airplane, Serial No. 43-12093, belonging to the plaintiff.

VI.

That by reason of said collision and as the result of carelessness; recklessness, negligence and violation of law by defendant Thomas W. Scott in operating said airplane belonging to defendant Douglas Aircraft Co. Inc., a California corporation, plaintiff was damaged in the sum of

Ten Thousand Five Hundred Ninety and 55/100 Dollars (\$10,590.55), which said sum was the reasonable cost of necessary repairs to said P-51B airplane.

Wherefore, plaintiff prays judgment against the defendants in the sum of Ten Thousand Five Hundred Ninety and 55/100 Dollars [3] (\$10,590.55), and for the costs herein.

JAMES M. CARTER
United States Attorney
RONALD WALKER
Assistant U. S. Attorney
CAMERON L. LILLIE
Assistant U. S. Attorney
Attorneys for Plaintiff

[Endorsed]: Filed Dec. 11, 1946. Edmund L. Smith,
Clerk. [4]

[Title of District Court and Cause]

ANSWER OF DOUGLAS AIRCRAFT CO., INC.,
A CORPORATION

Comes now the Douglas Aircraft Co., Inc., a corporation, and answering the complaint of the plaintiff on file herein denies and alleges as follows:

FIRST DEFENSE

The plaintiff's complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The plaintiff's complaint fails to state a claim against defendant upon which relief may be granted for the rea-

son that the action is one for the recovery of damages to property, and under the law of California, where the said action is commenced and where the said accident to the property occurred, the right to bring an action is barred after the lapse of three years' time from the time of the accident, and the said action is particularly barred by the provisions [5] of Section 338, subdivision 3, of the Code of Civil Procedure of the State of California.

THIRD DEFENSE

Defendant admits the allegations contained in paragraphs I, II and IV, and admits that there was a collision between the airplane belonging to the defendant and the airplane alleged and described as plaintiff's, on the 11th day of November, 1943, at the Los Angeles Municipal Airport. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the complaint, and on that ground denies said allegations, and denies each and every other allegation in the complaint.

FOURTH DEFENSE

That the accident and any damages plaintiff may have sustained, if any, were due directly and proximately to an unavoidable and inevitable accident so far as this answering defendant, its agents, servants or employees, are concerned.

FIFTH DEFENSE

I.

That the defendant is informed and believes and upon that ground alleges that the plaintiff, under appropriate statutes, had seized control of the Los Angeles Municipal Airport prior to the 11th day of November, 1943, and was operating and controlling all operations in the area

of the said airport and at the said airport, and all other operations of all airplanes elsewhere in the continental United States, by virtue of the fact that the United States was at war, and by virtue of the foregoing said plaintiff was in charge of the tower at the place where the said accident occurred, to-wit: the Los Angeles Municipal Airport, and in charge of all the area contained within the said airport.

II.

That at all times herein mentioned and prior to the accident [6] in question, the said A. W. Pitcairn was an agent of the plaintiff and as such agent was operating the said P-51B airplane described in paragraph III of the complaint, and that at all times herein mentioned the control tower and its employees, particularly on the date and at the time of the accident, were agents, servants and employees of the United States and operating under the direction and control of the United States.

III.

That under and by virtue of the rules and customs of the airport and of the Civil Aeronautics Authority in charge of the flight of airplanes in and around airports and in the air throughout the United States and the operation of airplanes in general, the parking of an airplane upon or near the runway of an airport without immediately moving the same out of said runway and into a proper place for storage, was forbidden. That contrary to the said rules and regulations, the said agent of the plaintiff, A. W. Pitcairn, did knowingly violate the said rule and did park the said P-51B airplane on or near the said runway of the Los Angeles Municipal Airport just prior to the accident sued upon by the plaintiff in plaintiff's complaint, and continued to park the airplane there for some

time thereafter and until the time of the accident, contrary to the said rules.

IV.

That the said tower which was controlled by the agents, servants and employees of the plaintiff also controlled the traffic incoming and outgoing at the airport and the actions of the owners and pilots of airplanes at the said airport, and the said agents, servants and employees of the plaintiff in the said tower did know that the said A. W. Pitcairn had improperly parked and kept his P-51B airplane on the runway at the said airport and did continue to permit him to so park said airplane, and despite said knowledge did order the defendant's employee, Thomas W. Scott, who was piloting the SBD-5 [7] airplane belonging to the defendant Douglas Aircraft Co., Inc., a corporation, to land on the said runway where the airplane of the plaintiff was parked, and to proceed up the runway to the proper place to store and park said SBD-5 airplane, well knowing that the said airplane piloted by the said Thomas W. Scott was one which prevented the pilot from looking directly forward on the runway on which he was proceeding or on any runway on the ground because of the nature of the construction of said airplane with its nose up in the air hiding from view the ground directly ahead of the airplane as it proceeded, and negligently failed to warn said Thomas W. Scott of the parking of the P-51B thereon, and despite said knowledge the said tower at said field operated by the agents, servants and employees of the plaintiff or under their direction and control, did negligently order the said Thomas W. Scott to proceed upon the said runway, and said A. W. Pitcairn did negligently continue to park his said airplane upon the said runway, and such negligence on the

part of said plaintiff, its agents, servants and employees, did proximately cause and contribute to the accident and damages to the plaintiff's property.

Wherefore, defendant demands judgment that the plaintiff take nothing by its complaint, and for defendant's costs sustained herein.

JAMES V. BREWER

Attorney for Defendant Douglas Aircraft Co.,
Inc., a corporation. [8]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 7, 1947. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

ANSWER OF DEFENDANT THOMAS W. SCOTT

Comes now the defendant Thomas W. Scott, and answering the complaint of the plaintiff on file herein denies and alleges as follows:

FIRST DEFENSE

The plaintiff's complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

The plaintiff's complaint fails to state a claim against the defendant upon which relief may be granted for the reason that the action is one for the recovery of damages to property, and under the law of California, where the said action is commenced and where the said accident to the property occurred, the right to bring an action is

barred after the lapse of three years' time from the time of the accident, and the said action is particularly barred by the provisions [10] of Section 338, subdivision 3, of the Code of Civil Procedure of the State of California.

THIRD DEFENSE

Defendant admits the allegations contained in paragraphs I, II and IV, and admits that there was a collision between the airplane operated by this defendant and the airplane alleged and described as plaintiff's, on the 11th day of November, 1943, at the Los Angeles Municipal Airport. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the complaint, and on that ground denies said allegations, and denies each and every other allegation in the complaint.

FOURTH DEFENSE

That the accident and any damages plaintiff may have sustained, if any, were due directly and proximately to an unavoidable and inevitable accident so far as this answering defendant is concerned.

FIFTH DEFENSE

I.

That the defendant is informed and believes and upon that ground alleges that the plaintiff, under appropriate statutes, had seized control of the Los Angeles Municipal Airport prior to the 11th day of November, 1943, and was operating and controlling all operations in the area of the said airport and at the said airport, and all other operations of all airplanes elsewhere in the continental United States, by virtue of the fact that the United States was at war, and by virtue of the foregoing said plaintiff was in charge of the tower at the place where the said

accident occurred, to-wit: the Los Angeles Municipal Airport, and in charge of all the area contained within the said airport.

II.

That at all times herein mentioned and prior to the accident in question, the said A. W. Pitcairn was an agent of the plaintiff, and as such agent was operating the said P-51B airplane described in [11] paragraph III of the complaint, and that at all times herein mentioned the control tower and its employees, particularly on the date and at the time of the accident, were agents, servants and employees of the United States and operating under the direction and control of the United States.

III.

That under and by virtue of the rules and customs of the airport and of the Civil Aeronautics Authority in charge of the flight of airplanes in and around airports and in the air throughout the United States and the operation of airplanes in general, the parking of an airplane upon or near the runway of an airport without immediately moving the same out of said runway and into a proper place for storage, was forbidden. That contrary to the said rules and regulations, the said agent of the plaintiff, A. W. Pitcairn, did knowingly violate the said rule and did park the said P-51B airplane on or near the said runway of the Los Angeles Municipal Airport just prior to the accident sued upon by the plaintiff in plaintiff's complaint, and continued to park the airplane there for some time thereafter and until the time of the accident, contrary to the said rules.

IV.

That the said tower which was controlled by the agents, servants and employees of the plaintiff also controlled the traffic incoming and outgoing at the airport and the actions of the owners and pilots of airplanes at the said airport, and the said agents, servants and employees of the plaintiff in the said tower did know that the said A. W. Pitcairn had improperly parked and kept his P-51B airplane on the runway at the said airport and did continue to permit him to so park said airplane, and despite said knowledge did order the defendant, Thomas W. Scott, who was piloting the SBD-5 airplane belonging to the defendant Douglas Aircraft Co., Inc., a corporation, to land on the said runway where the airplane of the plaintiff was [12] parked, and to proceed up the runway to the proper place to store and park said SBD-5 airplane, well knowing that the said airplane piloted by the said Thomas W. Scott was one which prevented the pilot from looking directly forward on the runway on which he was proceeding or on any runway on the ground because of the nature of the construction of said airplane with its nose up in the air hiding from view the ground directly ahead of the airplane as it proceeded, and negligently failed to warn said Thomas W. Scott of the parking of the P-51B thereon, and despite said knowledge the said tower at said field operated by the agents, servants and employees of the plaintiff or under their direction and control, did negligently order the said Thomas W. Scott to proceed upon the said runway, and said A. W. Pit-

cairn did negligently continue to park his said airplane upon the said runway, and such negligence on the part of said plaintiff, its agents, servants and employees, did proximately cause and contribute to the accident and damages to the plaintiff's property.

Wherefore, defendant demands judgment that the plaintiff take nothing by its complaint, and for defendant's costs sustained herein.

JAMES V. BREWER

Attorney for Defendant Thomas W. Scott. [13]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 2, 1947. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

VERDICT OF THE JURY

* * * * *

We, the jury in the above entitled cause, find the issues in favor of the defendants.

Dated: Los Angeles, California, May 14th, 1947.

CHAS. T. PIKE

Foreman of the Jury

[Endorsed]: Filed May 14, 1947. Edmund L. Smith, Clerk. [15]

[Title of District Court and Cause]

NOTICE OF MOTION FOR JUDGMENT OR
NEW TRIAL

To James V. Brewer, Attorney for Defendants, and
Douglas Aircraft Co. Inc., a corporation, and
Thomas W. Scott, Defendants.

Please Take Notice that the undersigned will bring the
above motion on for a hearing before this Court in Court-
room 7 of the above-entitled Court, at the Post Office and
Courthouse Building in the City of Los Angeles, at 10
o'clock A. M. on June 2, 1947, or as soon thereafter as
counsel can be heard.

Dated: May 22, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney
Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

By Cameron L. Lillie

Attorneys for Plaintiff

[Endorsed]: Filed May 22, 1947. Edmund L. Smith,
Clerk. [16]

[Title of District Court and Cause]

ALTERNATIVE MOTION FOR JUDGMENT OR
NEW TRIAL

Plaintiff moves the Court to set aside the verdict entered in the above-entitled cause on May 14, 1947, and to enter judgment in accordance with its motion for directed verdict on the ground that the motion for directed verdict should have been granted because:

A. There was no dispute in the facts introduced into evidence and therefore the question is one of law.

B. There was no evidence of contributory negligence on the part of the plaintiff, its agents, servants, or employees, or on the part of A. W. Pitcairn, the pilot of the plaintiff's airplane;

C. The evidence in the cause showed conclusively that the damages sustained by the plaintiff were the proximate result of the defendant's negligence.

In the alternative, plaintiff moves the Court to set aside the verdict and grant defendant a new trial on the following grounds:

A. There was insufficient evidence to justify the verdict; [17]

B. There was no evidence of contributory negligence on the part of the plaintiff, its agents, servants, or employees, or on the part of A. W. Pitcairn, the pilot of the plaintiff's airplane;

C. The evidence in the cause showed conclusively that the damages sustained by the plaintiff were the proximate result of the defendant's negligence.

Respectfully submitted,

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

By Cameron L. Lillie

Attorneys for Plaintiff

[Endorsed]: Filed May 22, 1947. Edmund L. Smith,
Clerk. [18]

In the District Court of the United States in and for the
Southern District of California
Central Division
No. 6074 O'C

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Defendants.

JUDGMENT ON VERDICT FOR DEFENDANTS

Be It Remembered, that the above entitled case was set for trial on May 6, 1947, at 10 o'clock A. M. in Room 7 of the Federal Building, Los Angeles, California, before

the Honorable J. F. T. O'Connor, District Judge Presiding, and the same trailed from this day until May 12, 1947, when the trial was commenced and the plaintiff being represented by James M. Carter, United States Attorney, and Cameron L. Lillie, Assistant United States Attorney, and the defendants Douglas Aircraft Co., Inc., a corporation, and Thomas W. Scott being represented by James V. Brewer, and both parties having announced they were ready a jury was duly impaneled and questioned by the Court on voir dire, and after peremptory challenges and both sides having announced that they were satisfied with the jury, the same was sworn to try the case and thereafter evidence having been presented by plaintiff and by the defendants, and the Court having duly instructed the jury as to the law and the jury did then, on the [19] 14th day of May, 1947, render its verdict with title of the Court and cause as above stated, said verdict was as follows:

“VERDICT OF THE JURY

We, the jury in the above entitled case, find the issues in favor of the defendants.

Dated: Los Angeles, California, May 14, 1947

(Signed) Charles T. Pike

Foreman of the Jury”

and the said verdict of the jury having been duly filed on May 14, 1947, it appearing to the Court to be proper in the premises, it is hereby

Ordered, Adjudged and Decreed, pursuant to said verdict, that the United States of America, plaintiff, take nothing by their action herein.

Dated: Los Angeles, California, May 26, 1947.

J. F. T. O'CONNOR

District Judge

Approved as to form.

Dated: May 26, 1947.

JAMES M. CARTER, United States Attorney,
RONALD WALKER, Assistant U. S. Attorney,
CAMERON L. LILLIE, Assistant U. S. Attorney,

By Cameron L. Lillie

Attorneys for Plaintiff

Judgment entered May 26, 1947. Docketed May 26, 1947. Book C. O. B. 43, page 317. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed May 26, 1947. Edmund L. Smith, Clerk. [20]

[Minutes: Monday, June 2, 1947]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for hearing of motion of plaintiff for a new trial, pursuant to notice filed May 22, 1947; also, to set aside judgment and enter judgment for the plaintiff; Cameron Lillie, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; James V. Brewer, Esq., appearing as counsel for the defendant; Attorney Lillie argues. The Court makes a statement and it is ordered that the said motion of the plaintiff for a new trial is denied and exception allowed. [21]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Defendants, Douglas Aircraft Co., Inc., a corporation, and Thomas W. Scott, and to Their Attorney, James V. Brewer:

Notice Is Hereby Given that the United States of America does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on or about the 26th day of May, 1947, and from the whole thereof.

Dated this 8th day of August, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Plaintiff [22]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 8, 1947. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH *DISTRICT*

It appearing that the Exhibits heretofore used at the trial of this action should be sent to the United States Circuit Court of Appeals for the Ninth *District* in lieu of copies thereof;

It Is Hereby Ordered that the Clerk of the Court for this District transport said original Exhibits to the United

States Circuit Court of Appeals for the Ninth *District* and that upon the termination of said appeal the said original Exhibits shall be returned to the Clerk of this District.

Dated this 6th day of August, 1947.

JACOB WEINBERGER

Judge of United States District Court

[Endorsed]: Filed Aug. 6, 1947. Edmund L. Smith,
Clerk. [24]

[Title of District Court and Cause]

ORDER FOR EXTENSIONS OF TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
THE ACTION

Notice of Appeal having been filed on the eighth day of August, 1947, and it appearing to the Court that a certified copy of the transcript of record of said cause cannot be prepared prior to October 20, 1947, and upon motion of the appellant in the above-entitled action that the time within which appellants may file the record on appeal and docket the action with the Circuit Court of Appeals may be extended in accordance with Rule 73(g), Rules of Civil Procedure for the District Courts of the United States:

It Is Hereby Ordered that time within which appellants may file the record on appeal and docket the action with the Circuit Court of Appeals be, and is hereby extended to and including October 20, 1947.

Dated this 3d day of September, 1947.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Sep. 4, 1947. Edmund L. Smith,
Clerk. [27]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 27, inclusive, contain full, true and correct copies of Complaint for Damages; Answer of Douglas Aircraft Co., Inc.; Answer of Defendant Thomas W. Scott; Verdict of the Jury; Notice of Motion for Judgment or New Trial; Alternative Motion for Judgment or New Trial; Judgment on Verdict for Defendants; Minute Order Entered June 2, 1947; Notice of Appeal; Order of Transmission of Original Exhibits; Designation of Record on Appeal and Order for Extension of Time for Filing Record and Docketing Appeal which, together with copy of reporter's transcript of proceedings on May 13 and 14, 1947 and original Plaintiff's Exhibits 1, 2, and 3-A to 3-X, inclusive and original Defendants' Exhibits A-1 to A-19, B-1, B-2 and C, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 15th day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH, Clerk

By Theodore Hocke

Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, May 13, 1947

Appearances:

For the Plaintiff: James M. Carter, United States Attorney; by Cameron L. Lillie, Assistant United States Attorney.

For the Defendant: James V. Brewer, Esq., 1125 Fidelity Building, Los Angeles, California.

Los Angeles, California, May 13, 1947,

10:00 O'Clock A. M.

(A jury was duly impaneled and sworn.)

The Clerk: No. 6074 Civil, United States vs. Douglas Aircraft Co., for further jury trial.

Mr. Lillie: Ready for the government.

Mr. Bremer: Ready.

The Court: Let the record show the jury are present and counsel in court.

Do you care to make an opening statement, government?

Mr. Lillie: Yes, your Honor.

The Court: All right, proceed.

(Opening Statements)

(On behalf of Plaintiff and Defendant)

The Court: Call your first witness.

Mr. Lillie: Mr. Baker.

JOHN R. BAKER

called as a witness by and in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: John R. Baker.

The Clerk: B-a-k-e-r?

The Witness: That's right.

Direct Examination.

Q. By Mr. Lillie: Mr. Baker, where do you reside? [2*]

A. Altadena.

Q. And what is the address?

A. 172 West Figueroa Drive, Altadena, California.

Q. By whom are you employed?

A. North American Aviation, Inc.

Q. How long have you been employed by North American?

A. Nine years and nine months.

Q. At the time of the accident in question what was your occupation?

A. Assistant contract administrator.

Q. And as an assistant contract administrator were certain records and files kept under your supervision?

A. Yes, sir.

Q. In the course of business? A. Yes, sir.

Q. I will show you a file and ask you if you recognize it. A. I do.

Q. Is that file kept in the ordinary course of business under your supervision? A. Yes, sir.

(Testimony of John R. Baker)

Q. Does it relate to the airplane which was damaged in the action which is under litigation now?

A. It does.

Mr. Lillie: I will offer it in evidence, your Honor. [3]

The Court: Has the defendant seen the file?

Mr. Lillie: Yes.

The Court: In evidence.

The Clerk: Government's Exhibit No. 2.

(The document referred to was received in evidence and marked as Government's Exhibit No. 2.)

Q. By Mr. Lillie: Do you recall what the number of the airplane that was damaged was that was assigned by the Army, Mr. Baker?

A. By memory, are you asking?

Q. Yes. Well, can you refer to it in the file?

A. Yes, sir. 43-12093.

Mr. Brewer: What was that again, Mr. Baker?

The Witness: 43-12093.

Q. By Mr. Lillie: In that file was there a contract entered into by North America Aviation and the government for the purchase of a stated number of airplanes?

A. Yes, sir.

Q. How many were there? A. 400.

Q. When was that contract entered into?

A. December 15, 1942.

Q. Thereafter was the plane in question delivered pursuant to that contract?

A. Yes, sir. [4]

Q. When was it delivered and accepted by the Army? Do your records indicate that?

A. The contract does not indicate that, but the receiving report indicates that it was delivered to the Army April 29, 1943.

(Testimony of John R. Baker)

Q. April 29, 1943. Do your records indicate that it was accepted also as of that date? A. Yes, sir.

Q. Did the Army take control and possession of it, do you know? Do your records indicate?

A. The records indicate such, yes.

Q. Do your records indicate whether or not it was turned back to North American? A. Yes.

Q. On what day? A. May 4, 1943.

Q. Do your records indicate the purpose?

A. For flight tests.

Q. Do the records in that file indicate how long you held it before it was again turned back to the Army?

A. I don't know how to answer your question on that, sir, because the airplane was in our possession at the time the accident occurred; and we retained it until after we repaired it.

Q. Then after you returned it, did you— [5]

The Court (Interposing): He did not say, "returned."

Q. By Mr. Lillie: After you repaired it, did you return it to the War Department, the Army?

A. After it was repaired, we returned it to the War Department.

Q. Do your records indicate that?

A. Not these here, no.

Q. Do you know of your own knowledge?

A. Yes.

Q. Do your records in that file indicate whether a survey was made on the plane after it was damaged?

A. Yes.

Q. Do they indicate who made the survey?

A. Yes, sir.

Q. Who made the survey?

A. Plant Protection.

(Testimony of John R. Baker)

Q. Do your records indicate a survey as to the repair of the plane? By that I mean do your records indicate whether or not anyone estimated what the repair would be? A. Yes.

Q. Do your records indicate that?

A. Yes, sir, they do.

Q. Do they indicate who made the survey?

A. No, they don't show that.

Q. Does one of your records in that file indicate [6] whether or not the repairs were made?

A. Yes, sir.

Q. Is this the paper (indicating)?

A. That is the paper. That shows our estimate as to what it would take to repair the airplane.

Q. Is that just for materials or materials and labor?

A. Materials and labor.

Q. And the amount of that is how much?

A. \$5,139.78.

Q. \$5,139.78. Well, now, was all the material supplied by North American? A. No, sir.

Q. What does this "Wing Panel Replacement Assembly 1GFE" stand for?

A. That stands for government-furnished equipment as furnished to North American by the government.

Q. Was that by reason of the fact you didn't have that merchandise in stock?

A. That's right.

Q. And the government did have it in stock?

A. Correct.

Q. Do you know what the valuation of a wing panel replacement assembly was at that time? A. I do.

Q. Also as to an elevator assembly, covered? [7]

A. Yes, sir.

(Testimony of John R. Baker)

Q. Stabilizer assembly, vertical? A. Yes.

Q. And a rudder assembly, covered? A. Yes.

Q. And those are the only government-issued equipment? A. That's right.

Q. Can you tell me what those amounts are, off-hand?

A. I couldn't, without referring to our files on that.

Q. Well, you prepared a memorandum for me, and I will show it to you so that your recollection may be refreshed and see if you can then determine what the amounts were. A. Yes.

Q. How much was the wing panel replacement assembly? A. \$4,640.33.

Q. And the aileron assembly? No, it is an elevator.

A. Elevator, \$262.04.

Q. Stabilizer assembly, vertical? A. \$284.58.

Q. And the rudder? A. \$262.88.

Q. So that the amount that would have been charged the Army, had they not had the parts to supply you, would have been the total of the two amounts: \$5,449.83.

A. Correct. [8]

Q. And the \$5,139.78?

A. That's right.

Q. Is that correct? Thereafter was the Army billed, Mr. Baker? Do your records indicate that the Army was billed, the government, the amount in question?

A. The Army was billed by North American by the amount in this quotation, that is correct.

Q. Do you know whether or not it was paid?

A. Yes, sir, it was.

Mr. Lillie: Cross examine.

(Testimony of John R. Baker)

Cross Examination.

By Mr. Brewer:

Q. Mr. Baker, this memo of May 1, 1947, relating to these prices of parts: are those the prices charged at that time? A. That's right.

Q. When you gave the number of this plane, this "43," does that mean that in '43 it was built?

A. No, sir. That is the designation of the Army Air Forces, the serial numbers the Army Air Forces placed on the airplane. The "43" represented the year that it was built.

Q. How many planes of this kind had been built?

A. At the time?

Q. Yes.

A. That this accident had occurred? This was the [9] first airplane on that contract.

Mr. Brewer: All right, I think that is all.

Mr. Lillie: That is all, Mr. Baker.

(Witness excused.)

Mr. Lillie: Call Mr. Armitage.

ROMMEL JOSEPH ARMITAGE, JR.

called as a witness by and in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Rommel Joseph Armitage.

The Clerk: R-o-m-m-e-l Joseph?

The Witness: Yes.

The Clerk: Your last name?

The Witness: A-r-m-i-t-a-g-e.

(Testimony of Rommel Joseph Armitage, Jr.)

The Clerk: Junior?

The Witness: Yes.

The Clerk: Rommel Joseph Armitage, Jr.?

The Witness: Yes.

The Clerk: Thank you.

Direct Examination.

By Mr. Lillie:

Q. Where do you reside, Mr. Armitage?

A. 825 West 161st, Gardena.

Q. Where are you employed now?

A. North American Aviation. [10]

Q. Were you so employed on November 11, 1943?

A. I was.

Q. What was your position at that time, Mr. Armitage?

A. General foreman of the Flight Test Hangar, in charge of maintenance.

Mr. Lillie: I don't hear you.

Mr. Brewer: Keep your voice up.

The Witness: General foreman of the Flight Test Hangar, in charge of maintenance.

Q. By Mr. Lillie: Do you recall the accident in which this plane was damaged? A. I do.

Q. Did you see the plane after the accident?

A. I did.

Q. Did you make a survey on the plane for the repair of it? A. Parts required, yes.

Q. I will show you a quotation which is contained in Government's Exhibit 2. I will ask you to look at that.

A. (Examining document)

Q. And tell the jury whether or not those parts were actually placed upon that plane.

(Testimony of Rommel Joseph Armitage, Jr.)

A. Those parts were placed on that airplane.

Q. Under your supervision?

A. Under my supervision, yes. [11]

Q. Were they the necessary parts required to repair that plane?

A. Yes.

Mr. Lillie: That is all.

Mr. Brewer: No questions.

Mr. Lillie: Step down.

The Court: That is all, thank you.

(Witness excused.)

Mr. Lillie: Mr. Virgin.

EDWARD WARREN VIRGIN,

called as a witness by and in behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Edward Warren Virgin.

The Clerk: How do you spell your name?

The Witness: Virgin, V-i-r-g-i-n.

The Clerk: Will you take the stand, please?

Direct Examination.

By Mr. Lillie:

Q. Where do you reside, Mr. Virgin?

A. 2932 Wicklow Road, Los Angeles, California.

Q. What is your occupation, sir?

A. I am the chief test pilot, North American Aviation.

Q. How long have you been employed in that capacity?

A. I have been employed with North American six years [12] and three months. I don't recall the exact date of my being made chief test pilot.

(Testimony of Edward Warren Virgin)

Q. Do you recall whether or not it was prior to November 11, 1943, when this accident occurred?

A. Yes.

Q. It was prior to that? A. Yes.

Q. What are your duties as chief test pilot and what were your duties at that time on November 11, 1943?

A. To make flights on experimental aircraft, flight tests on experimental aircraft, and also direct in the planning and conduction of other tests by the remainder of the flight test section.

Q. How many pilots did you have working under you at that time, Mr. Virgin? A. Four.

Q. What were their duties?

A. To conduct authorized tests on experimental aircraft.

Q. Now, when you say "authorized tests" what do you mean by "authorized tests"?

A. Well, the Army loaned to North American on contract certain experimental aircraft for the express purpose to conduct tests on those aircraft pertaining to the development, proving and the establishment of the particular characteristics [13] of that airplane.

Q. Well, did the Army, under its authorization, designate what the tests were to be?

A. We requested of the Army the airplanes for specific test purposes.

Q. Could any pilot fly those planes?

A. Only the authorized pilots we had on our staff at the time.

Q. Were they authorized by or certified by the Army?

A. They were.

Q. For that particular purpose? A. Yes.

(Testimony of Edward Warren Virgin)

Q. Did you have in your employ at that time A. W. Pitcairn? A. Yes.

Q. How long had he been working for North American, do you know? A. I don't recall.

Q. Was he an experienced pilot, do you know?

A. Yes.

Q. Was he authorized to make the flight tests?

A. He was.

Q. On the day in question, on November 11, 1943?

A. He was.

Q. Who gave him that authorization? [14]

A. I assigned Pitcairn to the flight, and I was exercising a prerogative which the Army bestowed upon me.

Q. What was the purpose of the test, Mr. Virgin?

A. The purpose of the test was to determine the air-flow characteristics of the coolant scoop of the P-51 aircraft.

Q. Did you use any instruments to determine that?

A. Yes.

Q. What kind of instruments did you use?

A. We used in the scoop in question a series of rakes which, in turn, are evenly spaced throughout the scoop. These rakes are connected to monometers or airspeed indicators in order to read the total pressure and the static pressure in this scoop in order to determine the flow characteristics, the airflow characteristics.

Q. Now, how was the plane taken onto the landing strip?

A. It was towed out by a tractor.

Q. And was there a particular purpose?

A. The reason that we did that is because the rakes, which I have mentioned, have very small pressure and

(Testimony of Edward Warren Virgin)

static holes in them; and if you start the propeller, the scoop being right behind the propeller, dirt and dust are picked up off the runway, thrown into the scoop, which in turn is very likely to clog up the rake openings, hence nullifying the test. [15]

Q. Was this the first test of this type of equipment that had been made by North American? A. No.

Q. Was that custom in usage on that field to proceed on that basis of towing a plane out?

Mr. Brewer: Just a moment. We object to that on the ground that the witness is not shown to be qualified. There is no proper foundation laid as to usage on that field.

The Court: Well, you can develop that.

Q. By Mr. Lillie: How long did you work out at that field, Mr. Virgin?

A. Since February 1, 1941.

Q. In that connection had you flown different types of planes from that field and into it? A. Yes.

Q. How often?

A. Oh, in the early stages of the war, along about 1941, I would fly on the average of 30 hours a month, 30 or 40 hours a month.

Q. How many hours of flight have you had?

A. 3,000.

Q. On what kind of ships?

A. Mostly all military types.

Q. Single and multiple-motor?

A. Single and multi-engine. [16]

Q. Are you still flying out at that field?

A. Yes.

Mr. Lillie: Is he sufficiently qualified, your Honor?

(Testimony of Edward Warren Virgin)

The Court: Yes, proceed.

Q. By Mr. Lillie: I will ask you if, in respect to this test that Pitcairn had been authorized to conduct that morning, it was the practice and custom and usage at the field to tow that plane out to the air strip which he was going to take off?

A. In a test of that type we generally contact the control tower and tell them exactly what we are going to do, and they grant any reasonable request, which I consider this to be.

Q. Do you know whether they were contacted that day? Did you contact them?

Q. I am not sure, but I can reasonably be assured that it was done.

Q. What occurred when a plane landed? Did you send a tractor out after it then?

A. It was just customary at the time to not have men standing by awaiting for the termination of such a flight but to have the pilot notify us through the control tower when he was about to land, and we would dispatch a tractor to pick him up and take him into the hangar.

Q. Do you know what the size of the wingspan of a P-51 [17] happens to be?

A. Approximately 37 feet.

Q. If a plane, a P-51, were parked on the edge of a runway with its right wheel as close to the edge as it could possibly be, approximately how much would be extending into the runway?

A. Not over 25 feet.

Q. On those P-51s, what type of a seat do they have?

A. Well, it is a bucket seat designed to hold a seat-type parachute which is adjustable.

(Testimony of Edward Warren Virgin)

Q. Do they have any way of raising or lowering the seat in taxiing? A. Yes.

Q. Are you at all familiar with the Douglas SBD, such as the type that was flown by Mr. Scott?

A. Only just a knowledge that would come with my profession, being familiar with most all aircraft in a vague way.

Q. Well, do you know whether it has a process whereby the seat can be raised and lowered before taxiing?

A. I have never seen it but I am sure it does.

Mr. Lillie: That is all.

The Court: Ladies and gentlemen of the jury, you will not discuss this matter among yourselves nor permit anyone to discuss it in your presence. Do not form or express any [18] opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take our morning recess.

(Recess.)

The Court: Proceed. Let the record show the jury are present.

Mr. Lillie: Your Honor, I should like to ask a few more questions of this witness.

The Court: All right.

Mr. Lillie: We have another witness due at 2:00 o'clock, but we don't know whether he will be able to get in. This man may be able to clear it up so we can dispense with the other witness.

The Court: Well, see how far we can get.

Q. By Mr. Lillie: Mr. Virgin, since 1941 to this date you have worked out at the Municipal Airport, is that correct? A. Yes.

(Testimony of Edward Warren Virgin)

Q. Did you daily come in contact with the management of the airport?

A. Yes, I did, along about that particular time because our offices were right under the offices of the city officials.

Q. Do you know to your own knowledge who managed, controlled and maintained the airport?

A. Mr. Woody DeSilva was the manager, and Mr. Tucker—I don't know his capacity—but he seemed to be the righthand man.

Q. Do you know by whom they were employed?

A. The City of Los Angeles.

Q. Do you know whether or not at any time during the war period the government took over control of the airport? By that I mean the War Department?

A. I don't think they ever did for management.

Q. Well, do you know as to who controlled it?

A. No, they didn't for control. They only laid down, you might say, rules under which we operated. I can elaborate on that a little.

At the beginning of the war—well, let's put it this way—before the war we were given a free hand to clear with the control tower and go and conduct a test in any place that we so desired. After the war started the Army set up control zones or, we will say, flight test areas; and we would clear in the normal manner through the CAA control tower and tell them that we were conducting a test, for instance, in the south test area which was North American's area.

Q. Well, by "south test area" do you mean ground or air space?

A. It is air space above certain ground markings.

(Testimony of Edward Warren Virgin)

Q. I see. Well, did you have other airplanes that you were trying out this cooling scoop on before this time?

A. No.

Q. Well, then, had you ever had occasion before this time to need a tow for an airplane? A. Yes.

Q. What was the reason for that service?

A. We have made previous boundary layer surveys over the wing on a P-51 aircraft which employs the same type of air pick-up. [23]

Q. What did you call them again?

A. A boundary layer survey.

Q. Boundary what? A. Layer, L-a-y-e-r.

Q. Boundry layer survey?

A. In other words, it is more or less to test the efficiency of a wing.

Q. Of the wing itself? A. Yes.

Q. I see. These rakes tested the air pressure that was exerted on the bottom of the wing, is that it?

A. On the top of the wing, yes.

Q. On the top of the wing. So that you wanted to keep the dust out of those holes in the rakes?

A. Yes, sir.

Q. And the runways were covered with dust; the field itself was covered with dust, wasn't it?

A. Any macadam surface has a sufficient amount of dust or dirt particles that could clog up those openings.

Q. About how many of these tests of this nature had been done before the accident on Armistice Day, 1943, with this Mustang, if you know?

A. One series of tests before this scoop test.

Q. On one plane or several? A. One plane. [24]

Q. And a series of tests: about how many flights would that be?

(Testimony of Edward Warren Virgin)

A. I would think that a test could be run in maybe 10 hours, 10 or 15 hours flying time.

Q. Well, how many flights, take-offs and landings?

A. Ten or 15.

Q. Fifteen?

A. Ten or 15 one-hour flights.

Q. Oh, I see. How much of a flight had that been this day? A. About an hour's flight.

Q. About an hour. And over what period of time had this been done, these tests?

A. I only recall the day of the accident was not the first flight on that particular test.

Q. And this particular test was being done for the United States Army, wasn't it? A. Yes.

Q. Had they furnished the equipment for the tests?

A. No, sir.

Q. The rakes and cooling scoop?

A. The cooling scoop is part of the airplane. The instrumentation was the property of North American.

Q. I see. At any rate, the Army knew about this test and had informed the CAA tower there at the field that you were [25] going to make those tests?

A. No, sir.

Q. Who informed them of that? A. We did.

Q. You did. And then they authorized you to make those flights tests from that field?

A. They gave us permission to.

Q. Then the tower knew of your desire to have these planes hauled in by tractors? A. Yes.

Q. That had been done on other occasions before this accident? A. Yes.

Q. Had you ever seen that done before? A. Yes.

(Testimony of Edward Warren Virgin)

Q. You say it was customary for the pilot to notify the control tower while he was in the air of his intention to approach and land and that he wanted the tractor tow?

A. Yes.

Q. Then the tower would notify you or your staff out there and you would send out a tractor to tow?

A. Yes.

Q. The tower would tell you where to go with the tractor, is that it? A. Yes, sir. [26]

Q. Where did you customarily go?

A. The customary spot for the airplane to taxi to after landing was the spot that Mr. Pitcairn stopped the airplane.

Q. Did you usually have the tractor out there for his landing when he got there? A. No.

Q. Where were the tractors kept?

A. Just under the control tower at the field, hardly a few minutes away from the location that the airplanes stopped.

Q. Do you understand this diagram here?

A. Yes.

Q. Would you step here and mark it where the tractors were kept?

The Court: Mr. Brewer, will you take a red pencil and mark it with a large "N," and "S," an "E," and "W" about four inches?

Mr. Brewer: Yes, your Honor. (Marking diagram)
Is that large enough?

The Court: Thank you. That will help the jury.

Q. By Mr. Brewer: Will you mark now with that red pencil, too, where these tractors were?

(Testimony of Edward Warren Virgin)

A. The tractors were at—during our operations here the tractors were apt to go anywhere out on this landing apron or anywhere out on Runway C which we were using as our run-up area. The spot, of course, that the airplanes stopped [27] was right here (indicating).

The Court: Put an “X” there and draw a line and put your initials.

The Witness: (Marking diagram) An “X,” sir, where the airplanes stopped?

The Court: That is right.

The Witness: (Marking diagram)

Q. By Mr. Brewer: Now, will you draw another “X” at the place where the tractors were customarily kept. A. Yes. (Marking diagram)

Q. And, if you will, now, just draw two lines down toward the bottom of the map and put your initials in.

A. (Marking diagram)

Q. While you are still at the diagram I want to ask you what route these tractors followed in getting over to the airplane from there?

A. Generally we have a drainage ditch right down about the middle of this strip, and generally they would go across here over on the road, over to this drainage ditch and right out the drainage ditch.

Q. All right. You may resume the stand.

Had you on occasions prior to November 11, 1943, seen this plane and the other planes that you spoke about where you had those tests use the tractor? Have you seen those planes being landed and towed in? [28]

A. Yes.

(Testimony of Edward Warren Virgin)

Q. And in the ordinary course of doing those things was it necessary for the planes to stand out there quite a while before they got out to them?

A. It was not necessary but—

Q. Did it happen, I mean?

A. I don't consider five, 10 minutes any excessive length of time.

Q. Well, was that the length of time they usually stood out there?

A. I can't recall that. I can't recall whether it was or was not. But I wouldn't say that 10 minutes, five or 10 minutes was an excessive length of time.

Q. Well, isn't it customary on an airport as busy as this to move all airplanes from the runways immediately after their landings?

A. That is correct. That is the desirable thing to do. However, the airport was devoted more or less to the activities of North American and the Douglas Company in the conduct of flight tests.

Q. There were several hundred landings and take-offs during the course of one day, weren't there, at that field?

A. Quite a few.

Q. This P-51 was camouflaged with brown paint, was it not? [29]

A. Painted with brown paint, yes.

Q. That is what we call a "Mustang"? A. Yes.

Q. Was it a monoplane, low-wing? A. Yes.

Q. And a tricycle landing gear?

A. No, conventional landing gear.

Q. Well, describe that to the jury, will you, please?

A. An airplane with a conventional landing gear has the two main wheels in the wing and a tail wheel, where

(Testimony of Edward Warren Virgin)

as a tricycle landing gear as he asked about has the two main landing gears in the wing and a nose wheel. That is the difference.

Q. How is the tractor hooked to the plane in case of towing like that, Mr. Virgin?

A. They have a towbar which is more or less of a triangle. One part hooks to one gear, the other to the other gear; and at the apex of the triangle the tractor hooks on, and it is towed.

Q. Did you go out to this plane following the accident? Were you there at the field?

A. I did. I did.

Q. Did you see the accident? A. No.

Q. You went out to the plane following the accident? A. Yes.

Q. And there was to the right or northwest of the plane a lot of space there, wasn't there, in this triangular space indicated on the diagram?

A. Well, it is flat ground there with grass, yes.

Q. Yes, with grass on it, was it not? A. Yes.

Q. This was the fall time, the grass was brown, was it not, dried up brown?

A. Well, I don't recall. I presume it might have been.

Q. All right. Well, at any rate, there were no other planes in that space, that triangular space I have just indicated? A. No.

Q. And there was plenty of room. It was big enough in size for this plane to park out there, the Mustang?

A. Well, that would defeat the entire purpose of the whole test, to taxi out in the dirt and get these rakes all full of dust. It is impossible to do that.

(Testimony of Edward Warren Virgin)

Q. The plane had to pass along the runway for a long distance before it got to that point, didn't it?

A. Yes, sir.

Q. The runway was dusty, too, wasn't it?

A. That is correct.

Q. And in passing along the runway it had to pull it- [31] self along by the propeller, didn't it?

The Court: Mr. Brewer, make it clear. When you say "the point" indicate the direction.

Mr. Brewer: Yes.

Q. The landings of these planes were made on 25-R, were they not?

A. Our airplane landed on 25-L.

Q. 25-L? A. Yes.

Q. The main runway? A. Yes.

Q. Did they all do that, these experimental planes of yours? A. Not necessarily.

Q. You mean this particular day this one did?

A. It did that day, yes.

Q. I see. So it landed on 25-L, the main runway and the widest one, and went down that runway to—

The Court (Interposing): West.

Q. By Mr. Brewer:—west to the diagonal runway 22?

A. That is correct.

Q. And then turned down the diagonal runway to the southwest and pulled over to the edge of the runway?

A. That is correct.

Q. About how far was it from the edge, the most south- [32] erly edge of the main runway?

A. A hundred feet plus.

Q. A little over a hundred feet? A. Yes.

(Testimony of Edward Warren Virgin)

Q. Well, the field with the grass in it was no more dusty than the runway, was it, sir?

Mr. Lillie: I object to that as argumentative.

The Court: Oh, no, I think that is proper to get all the conditions in there, counsel.

The Witness: Well, I will enlighten you a little bit on one point that has not been brought out. When the pilot just gets the airplane on the ground from a test like this he cuts the engine off. Now, he coasted all the way down to the spot that he stopped in order just to keep the propeller from kicking up dirt and throwing it into the scoop.

Now, it is impossible in the conduction of such a test to take an airplane right straight up or bring it right down. So the only thing we can do is take every precaution we can to cut out as many propeller revolutions as we possibly can in the conduct of that test. Hence, it is necessary to tow it out to the point of take-off. Of course, it is under power at that time and there is a possibility of dirt blowing into the scoop, and the same on landing, until such point as he cuts the engine off. Hence, that is the best we can do.

We have taken all precaution against keeping that pro- [33] peller on, the engine running, as much as we can.

Q. By Mr. Brewer: By question was, The grassy land in between these runways was no more dusty than the runways, was it? A. Oh, yes.

Q. About where would that plane land on this main runway in the ordinary course of flight where they intended to cut off the motor and turn up diagonally on 22?

A. He would land between the diagonal and the end of the field.

(Testimony of Edward Warren Virgin)

Q. How far out there, how many hundred feet?

A. A few hundred feet.

Q. About five or six hundred?

A. No, a few hundred, two or three hundred feet.

Q. Two and three hundred. Then in going along with the power off he had no control over his plane, except the brakes, is that it? A. That is correct.

Q. And the forward momentum of the plane?

A. His brakes and his rudder.

Q. And his rudder, yes.

Mr. Pitcairn later perished in an accident, didn't he?

A. Yes, sir.

The Court: I did not get the question and the answer, and I am sure the jury did not. [34]

(Question and answer read by the reporter.)

Mr. Lillie: I will object to that, if the court please, not material.

The Court: It is for the purpose of showing that he is not available. So that is proper.

Mr. Lillie: I see.

The Court: The jury might wonder why the particular individual was not produced.

Mr. Brewer: That was my idea, your Honor, in asking the question.

The Court: Yes.

Mr. Brewer: No further questions.

Redirect Examination.

By Mr. Lillie:

Q. I would like to clarify one point in my own mind, Mr. Virgin. When would the pilot request the control tower to send out the tractor?

A. When he was obtaining permission to land.

(Testimony of Edward Warren Virgin)

Q. When he was obtaining permission to land?

A. Yes.

Mr. Lillie: That is all, sir.

The Court: That is all. Thank you.

(Witness excused.)

The Court: Call your next witness.

Mr. Lillie: I am going to call the defendant Thomas [35] W. Scott under 43-B, if your Honor please, for cross examination.

The Court: All right.

THOMAS WARRE SCOTT

called as a witness by and on behalf of the plaintiff under Sections 43-B, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Thomas Warre Scott.

The Clerk: Is that W-a-r-e?

The Witness: W-a-r-r-e.

The Clerk: S-c-o-t-t?

The Witness: That is right.

Direct Examination.

By Mr. Lillie:

Q. Where do you reside Mr. Scott?

A. Newport Beach.

Q. What is your occupation?

A. I am in the sport fishing business now.

The Court: Repeat that answer.

(Answer read by the reporter.)

The Court: All right.

(Testimony of Thomas Warre Scott)

Q. By Mr. Lillie: On November 11, 1943, what was your occupation?

A. I was pilot for Douglas Aircraft. [36]

Q. How long had you been so employed by Douglas Aircraft Company?

A. Since June of 1942.

Q. Approximately a year and two months, is that correct?

A. Approximately.

Q. During that year and two months did you work off of the Los Angeles Municipal Airport?

A. Part of the time.

Q. How long?

A. I worked from June until December, and I was transferred to Tulsa, and I stayed back at the Tulsa plant until the following May. Then I was transferred back to the El Segundo plant.

Q. In May of 1943 you were transferred back to the—

A. (Interposing) It was April or May, I am not positive, the early spring.

Q. April or May. Does the El Segundo plant work off of Mines Field?

A. Yes.

Q. So that you then proceed to work from April or May of 1943 up to and beyond the date of this accident off of Mines Field?

A. That is correct.

Q. What type of planes were you testing between that period of April and May of 1943 and the date of the accident? [37]

A. The SBDs is all we had at the El Segundo plant. At Tulsa there were B-25s and B-24s, A-20s, A-24s.

Q. So that during that period that I asked you about you had been testing SBDs only?

Q. So that during that period that I asked you about

A. Yes.

(Testimony of Thomas Warre Scott)

Q. What kind of tests were you conducting on these SBDs?

A. Ours were just regular production tests. When a plane came off the line, we flew it to get all the bugs out, check and instruments and the motor and operation of the gear, the flaps.

Q. How long did those tests take on an average?

A. The first flight was an hour.

Q. Did you conduct only first flights? Or did you conduct a series of flights?

A. No. If the airplane was all right, an hour was enough. But if we found some that had to be corrected, sometimes we would have to fly them three or four times.

Q. Was that the type of test you were conducting at the time and prior to this accident?

A. It was a check flight, yes, the second flight, I think it was.

Q. Now, as I understand it, Mr. Scott, you came in and landed on Runway D, is that correct?

A. Well, at that time we called it "Runway R," I be- [38] lieve 25-R, the north runway.

Q. Would you be kind enough to step down to the board there? I will give you a colored pencil, and you mark approximately where you landed on this test flight at the time prior to the accident.

A. Where my wheels first touched the ground?

Q. That's right.

A. Approximately here (indicating).

Q. Will you mark that P-1?

A. (Marking diagram)

(Testimony of Thomas Warre Scott)

Q. At the time you landed there did you proceed to taxi down to the intersection of diagonal 22 and R-25?

A. No. I had had enough forward speed that I was just coasting down.

The Court: Indicate to the jury the direction that you traveled, to what point.

Q. By Mr. Lillie: And you coasted down to what point?

A. Approximately here (indicating). I was slowing when I made this turn.

Q. Will you make a mark on there when you entered the intersection? Mark that "P-2."

A. (Marking diagram)

Q. Just draw a line from it and mark it "P-2."

Now, at that time were you in touch with the control tower, Mr. Scott? [39]

A. I contacted them right approximately at this position, or he contacted me. I will take that back. I was—

Q. (Interposing) Do you recall what he said to you, Mr. Scott?

A. He told me to hold north of the main runway. I was cleared to the ramp, and to hold north of the main runway, I believe.

Q. Now, when the control tower told you that you were clear to the ramp and to hold north of the main runway, and you followed those directions, if you had followed those directions, where would you have gone?

A. Right where I did. I came down here, held north of the main runway.

Q. You would not have gone down to this point here (indicating)?

A. Not unless he directed me.

(Testimony of Thomas Warre Scott)

Q. I see. So that you then turned to your left and came down to the intersection of the main runway and diagonal 22 here, is that right? A. Yes.

Q. Will you place a mark there?

A. (Marking diagram)

Q. Did you stop there? A. Yes.

Q. What happened when you stopped there? [40]

A. Another airplane was taking off on the main runway.

Q. So you waited until that airplane took off in a westerly direction, is that right?

A. I waited until the control—until he had taken off and the control tower gave me permission to cross the main runway.

Q. Thereafter you crossed the main runway, is that correct? You did not taxi across the runway, did you?

A. I taxied.

The Court: What is the answer?

The Witness: Yes.

Q. By Mr. Lillie: Did you "S" across it?

A. No, not across the runway.

Q. Do you see the mark there, the approximate position where the P-51 was parked? Would that be about correct, within a hundred feet or so?

A. A hundred or 150 feet.

Q. After you crossed this main runway where did you start "S-ing"?

A. Just as I completed crossing the first turn I made my first turn approximately there (indicating).

Q. Then you collided with the P-51?

A. That's right.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given

(Testimony of Thomas Warre Scott)

you. You will [41] not discuss the matter among yourselves not permit anyone to discuss it in your presence. You will not form nor express any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a recess until 2:00 o'clock. Court will now recess until 2:00 o'clock.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same date.) [42]

Los Angeles, California, May 13, 1947,

2:00 o'clock p. m.

The Court: Let the record show the jury are present. Counsel for the plaintiff and defendant are in court. Proceed.

THOMAS WARRE SCOTT

the witness on the stand at the time of recess, being previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Lillie:

Q. Mr. Scott, if I recall correctly, we had you taxiing across the main runway and starting your east turn when you collided with the parked Army aircraft, is that correct? A. Yes.

Q. When you started taxiing down diagonal 22 between P-2, which is marked on the map, at the intersection, down to the point where you waited to cross the main runway, did you taxi in a straight line or did you "S" your plane so as to see forward?

A. No, I made—

(Testimony of Thomas Warre Scott)

Q. (Interposing) On that diagonal?

A. No, I made "S" turns on that strip there.

Q. Now, in making "S" turns you would have a direct view in front of you of that diagonal all the way down to the [43] end of it, is that correct? Or would you just look immediately before you?

A. No. You would just have a glimpse of it. As I turned the plane to the left, I could see out the right side. Down the diagonal I could see all the right side.

Q. Could you see all the way down the diagonal as you took your look?

A. I imagine so. I don't remember. I don't remember whether I looked that far.

Q. You don't remember whether you looked that far?

A. Not clear to the end. That was quite a ways down there.

Q. Then when you stopped your plane at the intersection of the main air strip, you testified you headed your plane in an easterly direction to watch a take-off of a plane on the east end of the main air strip?

A. That is correct.

Q. That is correct?

A. Not due east, but so I could see the runway.

Q. At that time did you look down the diagonal again?

A. I don't believe so. If I did, I don't remember.

Q. You then proceeded to turn your airplane and head it across the main strip, is that correct?

A. That is correct.

Q. And received permission from the control tower to [44] proceed? A. That's right.

Q. Now, were you in a hurry to cross that main air strip? A. Yes, sir.

(Testimony of Thomas Warre Scott)

Q. You crossed the main air strip and started your "S'es"? A. That is right.

Q. All the time you were looking to see if there was anything in front of you, is that correct?

A. I would look out the side. I couldn't see directly in front of me over the nose of the plane. I looked the best I could.

Q. The purpose of the "S-ing" (essing) was to get a clear unobstructed view of the diagonal down which you were proceeding, is that correct?

A. That is correct.

Q. And you did that? A. Yes.

Q. And you looked? A. Yes.

Q. You did not see the plane?

A. I know I didn't.

Q. And you crashed into it?

A. That's right. [45]

Mr. Lillie: That's all, your Honor.

The Court: That is all.

Mr. Brewer: Just one question.

Mr. Lillie: Might I clarify one point, Mr. Brewer? Is this redirect? I have him on cross examination.

Mr. Brewer: Yes.

Mr. Lillie: This is redirect?

Mr. Brewer: Yes, as to what you asked him.

Redirect Examination

By Mr. Brewer:

Q. Now, Mr. Scott, when did you first talk to the tower before coming down to the field?

A. You mean before I landed?

Q. Yes, that's it.

(Testimony of Thomas Warre Scott)

A. Oh, I was over in the north, over around Howard Hughes' plant in the northwest direction, I think, when I called for the first position.

Q. How did you communicate with the tower?

A. By radio.

Q. Now, was your radio when you took off tuned to the tower so they could hear you at all times when you cared to talk to them?

A. Yes.

Q. And you could hear them?

A. Yes. [46]

Q. They would put in a call number for you?

A. That's right.

Q. That was a number which you had for your plane that they used in order to call your attention to their call to you?

A. That's right.

Q. Then when you talked to the tower first before this landing was made, just what was said by the tower and by you?

A. I called the tower to give my position, and he answers and—

Q. (Interposing) What did you say to them about your position?

A. Well, I couldn't recall word for word.

Q. Well, just in substance.

A. I called, "Los Angeles Tower, this is Navy 302, over Howard Hughes at approximately 5,000 feet. Landing instructions."

Q. That meant, of course, that you wanted instructions from them as to how to land in the field?

A. Yes.

Q. In talking to the tower you used rather abbreviated language, didn't you?

A. Yes. That is set up by the CAA, the language that you use.

(Testimony of Thomas Warre Scott)

Q. Sir? [47]

A. That is set up by the CAA, the type of calls we make and the answers we make.

Q. All right. What did the tower say to you then?

A. He called, "Navy 302, this is Los Angeles Tower. You are cleared to enter the traffic pattern." And I believe he asked me to call him on the down-wind leg. I don't remember.

Q. All right. Now, what would the expression "down-wind leg" mean? Would you explain that to us, please?

A. You always land an aircraft into the wind, so I was going down-wind. As we enter the traffic pattern around the field, we are always required to go in the same direct at a certain altitude; and we generally go down-wind, past the tower and contact them there again for landing instructions.

Q. All right. Now, what was the direction of the wind on that day? Do you recall?

A. The wind was from the west.

Q. The wind was from the west. So you would have to land going west, is that correct, sir?

A. Yes, sir.

Q. And the down-wind leg would then be going east?

A. That's right.

Q. What would be the landing traffic pattern there? What direction would you fly your plane to get into the landing pattern?

A. I entered the pattern. I was traveling in a south- [48] erly direction and turned east down to my base leg, turned north until I reached the runway, and then turned west and landed.

(Testimony of Thomas Warre Scott)

Q. Now, after you got into this landing pattern did you talk to the tower again?

A. I believe I contacted them on the down-wind leg, and we received permission—and I received permission to land, but I didn't talk any after that.

Q. Did he tell you what place to land?

A. Yes. He told me to land on 25-R.

Q. 25-R. Any further instructions? A. No.

Q. Then you did land on 25-R here as you designated at "P-1"? A. Yes.

Q. And I believe you stated you went down to "P-2"? A. That's right.

Q. You stopped there, did you?

A. Oh, I don't think I stopped. I was rolling slow. I rolled around that turn.

Q. You rolled around the turn? A. Yes.

Q. When you got at that place did you talk to the tower again?

A. No. I think the tower called me and told me to hold [49] north of the main runway.

Q. And the main runway: which was the main runway here?

A. That is the wide strip "25."

Q. "25-L" here that I am pointing to? A. Yes.

Q. The main runway. It says here "300 feet wide." Is that about correct, sir?

A. I believe so, yes.

Q. What did you understand that "hold north of the main runway" to mean, sir?

A. Not to cross the main runway until I was given clearance to.

(Testimony of Thomas Warre Scott)

Q. Then when you came to a stop at the main runway there, was the plane visible from the tower?

A. Which plane was that?

Q. Yours. A. Oh, yes.

Q. It was visible from any—

A. (Interposing) Well, I say it was visible. Well, it must have been because it was a fairly clear day, yes.

Q. I mean is the tower in such a position that they can see the whole field? A. Yes.

Q. When you got to the main runway how long did you stay there? [50]

A. I don't remember. There was a plane taking off, preparing to take off; so, a matter of 30 seconds or a minute or a minute and a half.

Q. And in which direction did it take off?

A. To the west.

Q. It was then to the left of you as you stopped there at the main runway. A. That's right.

Q. Now, you have designated here your "X," it appears to me, at least, to be a little to the left side of the runway, the diagonal runway 22.

The Court: The left side, would it?

Mr. Brewer: The left side, I said, your Honor.

The Court: That would be west, would it?

Mr. Brewer: No. I think it would be east.

The Court: All right.

Q. By Mr. Brewer: Is that correct, Mr. Scott?

A. I don't know there. I just made an "X." The runway is pretty narrow.

Q. I understood you to say you faced a little east to watch this take-off.

A. I turned so I could see.

(Testimony of Thomas Warre Scott)

Q. Then after the take-off, after the take-off of that plane, did you talk to the tower again?

A. No. The tower gave me permission to cross the run- [51] way after that.

Q. What did he say?

A. "Navy 302, you are cleared across the main runway."

Q. Now, at that time, Mr. Scott, had you been testing planes for Douglas there for some time?

A. Yes, several months.

Q. And were you the only test pilot, or were there others?

A. Oh, no. There was quite a few more at that time.

Q. Quite a few more. Were you all testing SBDs?

A. Yes. That is the type plane they had there.

Q. As a matter of fact, there were quite a few of them on that field that day, were there not?

A. Yes.

Q. Where were you intending to take your plane after your landing?

A. Taxi down runway 22 to the parking strip. I believe they called that Runway C.

Q. This runway running east and west here?

A. Yes. That was our parking strip.

Q. Would that be it (indicating?)

A. That is a parking strip.

Q. That was used for that purpose at that time?

A. Yes. And I would taxi down 22 to that intersection and back up in front of the tower. [52]

Q. Back up to the east?

A. Yes.

(Testimony of Thomas Warre Scott)

Q. All right. Now, there were some planes parked there: SBDs, were there not, at the time that you landed on this particular day?

A. On the parking strip?

Q. Yes. A. Yes, sir.

Q. And some SBD planes? A. Yes.

Q. Will you indicate on the diagram, then, where these other planes were parked, Mr. Scott?

A. Well, I don't remember the exact position; but some of these were parked from one end completely up to the other. North American had just as many planes parked there as Douglas, but they would all be parked along this edge. And I taxied up this strip here (indicating).

Q. Facing out toward the field?

A. No. They would be facing in.

Q. Facing in?

A. Of course, they would pull out and taxi up here to take off.

Q. All right. How long have you been flying airplanes, sir? A. Since 1928. [53]

Q. How many flying hours have you had in that time?

A. At the time of the accident?

Q. Yes.

A. About 2,300, I think, 2,400.

Q. How many hours have you at this time?

A. 2,800.

Q. Have you had much experience with that particular type of plane before this accident?

A. Not until I went to work for Douglas. I had from it, I imagine, around 400 hours at the time of the accident.

(Testimony of Thomas Warre Scott)

Q. At the time of the accident you, of course, were familiar with that field also and had flown on it and off of it on prior occasions?

A. Yes. I flew off of it in 1928.

Q. You did?

A. Before it was an airport.

Q. I see. Had you flown different types of planes before that time, sir? A. Yes.

Q. What different types?

A. Well, from the smallest 50-horsepower on up, land and sea planes.

Q. Land and sea planes?

A. Single, multi-engine, four-engine.

Q. Had you flown any planes with more than one engine? [54] A. Yes.

Q. And how high horsepower had you ever used in the flight of a plane?

A. I think the B-17, around 6,200 at that time, was the largest one.

Q. Have you been continuously engaged in flying since '28? A. No.

Q. Well, just how many years had you spent in flying, then?

A. I flew up to about 1934 or '35, and then I didn't fly any more until 1941.

Q. What sort of license did you have at that time when this accident occurred?

A. A commercial license.

Q. This was a new plane that you were using, was it?

A. Yes.

Q. You stated this was a check flight. Do you know if this plane had been flown before? A. Yes, it had.

(Testimony of Thomas Warre Scott)

Q. About when did you take off on this flight?

A. Shortly after lunch, 1:30 or 2:00 o'clock.

Q. About how long was the flight itself?

A. Check flights are generally shorter; so it was probably 20 to 30 minutes. [55]

Q. Now, with reference to the time of your landing, what time was that, approximately, at the time of the accident?

A. I would guess around 2:30.

Q. At that time is the sun in the west there toward which you were flying at that time of year and at that time of day?

A. It would be in a westerly direction, yes.

Q. In other words, you were moving up a diagonal one way toward the sun, were you not?

A. Well, it would be towards the sun; but how directly I don't know.

Q. Now, at that time what was the color of the grass between the runways?

A. It would be a brown.

Q. Are there some low-lying hills surrounding this field to the west and north? A. Yes.

Q. What color were they?

A. They are sand. They would be a brown.

Q. What color were those buildings over there at that time; do you recall? Were they camouflaged?

A. Yes, they were camouflaged, I think part black and part brown.

The Court: You should not suggest the answer, counsel. [56]

Mr. Brewer: Beg pardon?

The Court: You should not suggest the answer on your examination.

(Testimony of Thomas Warre Scott)

Mr. Brewer: All right.

Q. Do you recall what color the runways were, particularly runway 22?

A. No. They had been camouflaged. They had several different types of paint on them at one time. It was just a Duke's Mixture.

Q. How did you manage these "S" turns, Mr. Scott?

A. Well, your right brake is—the brakes on airplanes are separate, and for your right wheel you use the right pedal and for your left brake you use the left pedal. By applying the right brake you turn to the right, and by applying the left brake you turn to the left.

Q. How big was this SBD, approximately?

A. The wingspread was about 42 feet.

Q. How long was the plane?

A. Well, I would judge about 30.

Q. Between what points did you do your "S" turning there, sir?

A. After I left Runway 25-R, down runway 22—

Q. Going down runway—

A. Down there I made "S" turns.

Q. Going down from "P-2" down to this "X" mark on Run- [57] way 22?

A. That's right. And then I started them after I crossed the main runway again. I may have started a little sooner or a little later.

Q. Sir?

A. I may have started a little sooner or a little later across that runway. You see, I am always anxious to get across the runway.

Q. You were asked the question if you were in a hurry to cross the main air strip. Why was that, sir?

(Testimony of Thomas Warre Scott)

A. Just in case somebody else might be landing that I didn't see.

Q. You had worked around that field quite a while, had you not, sir? A. Yes.

Q. That was a pretty busy field at that time, was it not? A. Yes.

Q. Lots of planes landing and taking off, is that correct? A. That's right.

Q. How far would you travel in making one of these "S" turns, first to the left, then to the right, that is, to get a complete look to the right or the left?

A. That would be awfully hard for me to say. I wouldn't [58] know whether to say 25 feet or 50 feet.

Q. Well, in turning to the right and then to the left, the two turns, I mean.

A. Well, the best I could say is between 25 and 50 feet to complete a complete "S."

The wind would have something to do with that, cross wind. Speed would have something to do with.

Q. What?

A. The speed that you were taxiing would have something to do with it.

Q. I am talking about this particular day.

A. I couldn't remember.

Q. You couldn't remember that?

A. Not that far back.

Q. About how many miles per hour can you taxi an airplane in using the airplane to pull it along ?

A. You mean in safety?

Q. Yes.

A. Oh, we judged it eight to 10 miles an hour is fast enough for those.

(Testimony of Thomas Warre Scott)

Q. Now, you said that this plane of yours was about 42- $\frac{1}{2}$ feet? A. Wingspread.

Q. Wingspread? A. Yes. [59]

Q. And 40 feet or whatever it was. Do you recall where you were with respect to the diagonal runway as it crossed the main runway when you did make that crossing there?

A. You mean whether I was in the center or to the one side?

Q. Yes.

A. Well, I always tried to taxi down the center.

Q. The center? A. Yes.

Q. Is that the usual practice and custom, to taxi down the center of a runway? A. Yes.

Q. You were doing that there in Runway 22, were you? A. Yes.

Q. Now, then, after you got across this main runway, do you know in which direction you turned, that is to say, whether to the left or the right first when you got off the main runway? A. No, I don't.

Q. Do you recall how many "S" turns, if any, you made after you got off the main runway before this collision? A. No, I am sorry, I don't.

Q. How high is the nose of this SBD from the ground?

A. You mean to the top of the cowling or the top of the propeller? [60]

Q. Well, I mean the cowling.

A. The cowling? Oh, I judge seven feet; seven, eight feet.

Q. How high to the top of the propeller?

A. That would be another three feet, 2- $\frac{1}{2}$, three feet.

(Testimony of Thomas Warre Scott)

Q. Now, when the propeller is revolving, can you see through that area? A. Oh, yes.

Q. With respect to this particular plane, when you were seated in the pilot's seat, could you look over the front end of the plane at all? A. No.

Q. Your only visibility to the front was by "S" turns, is that it? A. That is correct.

Q. How high was your head, we will say, seated in the pilot's seat, from the ground when the plane was in its usual position on the runway?

A. You mean with me in the seat?

Q. Yes, sir.

A. Oh, five or six feet.

Q. About how far do you make a turn to the right and left in making these "S" turns? Will you describe that, please, how much or an angle you display in making the turns?

A. I believe 15 degrees from the center. That would [61] throw me around enough.

Q. What particular color did the runway display, as a general thing, when you looked at it?

A. I would say it blended in with the background some, brown or—(Pause)

Q. Did you notice after the accident the particular color of this Mustang, P-51?

A. It has the Army khaki color on it.

Q. Did that blend in with the surrounding territory when you were any distance from it?

A. Yes, I would say so.

Q. Was that coloring of that P-51 the one solid, continuous color? Or was it mottled?

A. No, they are solid color.

(Testimony of Thomas Warre Scott)

Q. Did you notice where the Mustang was parked. Well, withdraw that for a minute.

You stated that you collided with this plane. Will you describe just how that collision took place?

A. Well, the first I knew is when my right wing hit his fin, tail fin.

Q. What fin?

A. That was the first indication.

Q. What fin?

A. Well, the tail of the aircraft.

Q. The tail. All right. [62]

A. That was the first indication I had of the aircraft.

Q. That was your right wing, did you say?

A. My right wing, yes.

Q. About where on your right wing?

A. I don't remember just where it was.

Mr. Lillie: It is stipulated, your Honor, that these pictures may be introduced into evidence as government's next exhibit in order.

Are they marked as one exhibit for identification?

The Court: How have you marked them, Mr. Cross?

The Clerk: These are marked from 3-A to 3-X, inclusive.

The Court: Admitted in evidence.

The Clerk: In evidence.

(The photographs referred to were received in evidence and marked Government's Exhibits 3-A to 3-X, inclusive.)

Mr. Brewer: What was the last question, Mr. Reporter?

(Question read by the reporter.)

(Testimony of Thomas Warre Scott)

Q. By Mr. Brewer: Mr. Scott, I have Government's Exhibit No. 3-P here. Is that the right wing of the SBD?

A. Yes, almost out to the wingtip.

Q. All right. That is what I was going to ask you.

Refreshing your recollection from that, what part of the wing struck the other plane?

A. Almost to the wingtip.

Q. Almost to the wingtip? [63] A. Yes.

Q. All right, thank you. What happened then, sir? Just describe what took place after that.

A. That swung my ship around into where my left wing was collided with his left wing.

Q. Did you finish? A. Yes.

Q. Now, did you shut off your motor then?

A. Yes.

Q. Did you get out of the plane? A. Yes.

Q. Did the other pilot get out of the plane, too?

A. Yes.

Q. Did you have any conversation with him there?

A. A little bit.

Q. And he was not injured in this accident?

A. No, luckily.

Q. Did you notice that plane then in its position on the runway after you got out?

A. I noticed it was sitting on the side of the runway, headed approximately west, if that is what you mean.

Q. That is what I wanted to know: headed approximately west. By that, this diagonal No. 22 runs sort of southwest? A. Yes.

Q. But was the Mustang headed more to the west than [64] that diagonal? A. Yes.

(Testimony of Thomas Warre Scott)

Q. How far was the right front wheel of the landing gear from the edge of the paved runway? Did you notice that?

A. No, I didn't. I thought both wheels were approximately on the edge of it.

Q. Well, did your collision with that plane move it any, do you know? A. No, I don't.

Q. You don't know that? A. No, I don't.

Mr. Lillie: I might add, your Honor, that it is further stipulated that these figures, which are Government's Exhibit 3-A to 3-X, were taken within 15 to 20 minutes after the accident.

The Court: It is so understood.

Mr. Brewer: I have some pictures here, too, your Honor.

Mr. Lillie: I stipulate that they may be introduced in evidence and that they were taken a half-hour afterwards.

Mr. Brewer: Within a half-hour.

Mr. Lillie: Within a half-hour. There is some writing on the back of them which—

Mr. Brewer (Interposing): We have the man that took them here. I just want to use one right now.

Mr. Lillie: It is stipulated that they may be introduced [65] as Defendant's Exhibits, your Honor?

The Clerk: They are admitted, your Honor?

The Court: In evidence.

The Clerk: Those will be Defendant's Exhibits A-1 to A-19, inclusive.

(The photographs referred to were received in evidence and marked Defendant's Exhibits A-1 to A-19.)

Q. By Mr. Brewer: I show you, Mr. Scott, two pictures, No. A-1 and A-19, which purport to be the pic-

(Testimony of Thomas Warre Scott)

tures of the accident, after the accident before the planes were moved.

I ask you to look at that and see if that refreshes your recollection as to the approximate position of this Mustang and your plane following the accident.

A. It looks to me like its further on the runway now. I just couldn't say for sure.

Q. All right, sir.

A. I don't remember.

Q. How long did you stay around there after the accident, Mr. Scott?

A. Just a matter of two or three minutes. Flight operations came out in a car and picked me right up took me in.

Q. What direction was your plane facing following the accident?

A. I believe in a northwesterly direction after I had swung around. [66]

Q. You have stated that you landed at this airport many times before the accident.

Was it customary for the tower to notify if there were any planes standing on the runway that you were to use?

A. Yes, they generally tried to.

Q. Did the tower notify you on that day that this Mustang was standing on that diagonal runway?

A. No.

Q. Is it customary practice for airports generally to allow planes to park on the runways that are being used for landing and take-off of planes?

A. I don't believe so; but I couldn't say for all airports.

(Testimony of Thomas Warre Scott)

Q. Was there a special strip at any time that was designated for parked planes there on that field?

A. Yes. That was Runway C, as they called it. That was the parking strip.

Q. What size was this Mustang, do you know?

A. No, I have never flown one. That was a little smaller than the SBD, a 35- or 36-foot wingspread, I judge.

Q. Was it any lower in height than the SBD?

A. Yes, I think it is.

Q. They were both single-motored planes, were they?

A. That's right.

Q. Was it customary at that particular airport for the [67] tower to notify you of any obstruction on the field such as a truck or an airplane?

A. Yes, they had done so.

Q. What, generally speaking, was the damage to the two planes, just of a general nature?

A. The Mustang's empenage section, I think, tail section, was damaged, and it's left wing; and the SBD's damage was the propeller and the left wing. Well, the right wing, too.

Q. What was the nature of the weather that day?

A. It was contact weather, clear.

Q. What do you mean by that, "contact flying weather"?

A. Yes. Visibility and ceiling were unlimited.

Q. Was there any haze?

A. There was some haze. I don't remember just what the visibility was that day.

(Testimony of Thomas Warre Scott)

Q. Did the position of the sun have any effect upon your vision as you came up the runway, the diagonal runway 22?

A. I don't believe so.

Q. Did the color of the Mustang blend in in any way with the surrounding territory and surrounding colors?

A. Well, it could have. I didn't see it; so I don't know. But it is the same color as the general background.

Mr. Brewer: I believe that is all at this time.

The Court: That is all.

Mr. Lillie: I would like to ask a few more questions, if [68] your Honor please.

The Court: All right.

Redirect Examination.

By Mr. Lillie:

Q. Mr. Scott, you had operated off that field, you testified, from May or April until the date of the accident and some time beyond that, so that you had occasion to use the field many times, is that correct?

A. That is correct.

Q. Now, in your experience on that field had the tower ever warned you of any truck or other impediment in the way of your plane when you were taxiing?

A. Yes, quite often.

Q. Quite often?

A. I won't say quite often; several times, particularly when we were repairing the taxi strips along there.

Q. When they had trucks on there?

A. Yes, or they would notify us that there was another airplane ahead of us taxiing.

(Testimony of Thomas Warre Scott)

Q. Mr. Scott, I am going to show you a deposition, which I believe was taken by your counsel, Mr. Brewer, March 10, 1945, and I will ask you merely to read on page 20, the last answer, the question and answer on page 24 down to here (indicating), and see if that refreshes your recollection as to the position of the P-51 on the diagonal 22 where it was [69] parked.

The Court: Was this deposition filed before the case was filed on December 11, 1946?

Mr. Brewer: Yes, your Honor. It was under a petition to preserve testimony.

The Court: All right.

Mr. Lillie: By reason of the death of Mr. Pitcairn.

Mr. Brewer: I think it has another number.

Mr. Lillie: Yes, it has, your Honor. Would your Honor like the number?

The Court: Yes.

Mr. Lillie: It was taken pursuant to petition filed with your Honor, and it is No. 4212-O'C.

The Court: All right.

Mr. Lillie: Petition of Mr. Brewer.

Q. By Mr. Lillie: Does that help you any, Mr. Scott?

A. Yes.

Q. Now, can you clear it up and tell us approximately where the P-51 was parked in connection with the edge of the runway, that is—

A. (Interposing) It was close to the edge of the runway, his wheels were, as close as he could get, I would say.

Q. That would be the northwesterly portion?

A. Yes.

(Testimony of Thomas Warre Scott)

Q. Considering the size of this runway, which is 150 [70] feet, and the position of the parked plane, could you estimate approximately how much runway was left?

A. You mean at the time of the collision or when I was making—

Q. Before the collision?

A. Before the collision? No, because I don't know just how much I would swing from one side to the other in making those "S" turns.

Q. Maybe I didn't form my question properly.

Considering the position in which the P-51 was parked, with its wheels up to the edge of the runway, do you have an estimate of how wide and what the overall length of the P-51 was? A. No.

Q. Now, the runway is 150 feet wide. Now much space would he have been taking up on that runway?

A. Not over 30 or 35 feet, I wouldn't think.

Q. So that he would have 120 feet on the other side of him?

A. Approximately that, yes.

Mr. Lillie: That is all, Mr. Scott.

Mr. Brewer: There are two questions I can think of, your Honor.

The Court: All right. [71]

Recross Examination.

By Mr. Brewer:

Q. You stated you had a conversation with Mr. Pitcairn. Just what was said by him?

Mr. Lillie: I will object to that on the ground that anything that Mr. Pitcairn said is not binding upon the

(Testimony of Thomas Warre Scott)

government because there is no showing that he was authorized to speak for the government. He may have been authorized to pilot the plane but not to speak for them.

Mr. Brewer: If your Honor please, it is alleged in the complaint that he was acting in business of the government.

Mr. Lillie: That is correct, your Honor.

Mr. Brewer: So we certainly would be allowed to develop his statements as to what happened, and things of that nature would be admissible and binding, as to what were his actions in the case.

Mr. Lillie: If the court please, as in any accident case, statements of the employee involved in an accident would always be admissible against the employee; but it would not be admissible against his employer, nor be binding upon the employer.

In this case we do not have the employee as a party to the action, and that would be the only instance where it would be admissible; and it would be limited entirely to the employee. [72]

Mr. Brewer: I think, if your Honor please, the statements made by an agent, made within the purview of his employment, are perfectly admissible and part of the *res gestae*.

The Court: How long after the accident was the statement made by the agent of the government who was piloting this aircraft?

The Witness: Is that for me to answer?

Mr. Brewer: That is for Mr. Scott to answer. I cannot.

(Testimony of Thomas Warre Scott)

The Court: Yes.

The Witness: A matter of a minute or two, as soon as we both got out of our airplanes.

The Court: There is no well-defined rule of evidence as to just the demarcation as to when the rule of *res gestae* will apply and does not apply.

There are two questions here to be decided whether or not the statements made by this particular individual the complaint alleges was operating this plane for the government of the United States; and, secondly, as counsel points out, if it is admissible, it comes within the second rule that it is near enough to the accident while the party has not yet recovered from the shock, the theory of *res gestae* being that a statement made instantly after the shock of an accident before there is time for consideration and determination of the facts in his own interest, that is as near as we can get to the basis of the *res gestae* rule. [73]

I am inclined to believe that statements made by the pilot who was operating the plane for the government of the United States, the government being on the same footing as a corporation or an individual, and the statement having been made within a minute of the accident, there does not seem to be any motive there within that time to make any colored statements.

I am going to allow the witness to answer and allow an exception to the government because the rule is giving exceptions to all rulings of the court, anyway.

Mr. Brewer: Thank you, your Honor.

The Court: Proceed.

(Testimony of Thomas Warre Scott)

Q. By Mr. Brewer: Will you state what Mr. Pitcairn said to you?

A. I got out on the wing of my plane. He wasn't able to get out right away because my propeller was right against him.

The first thing he said, "I am glad you cut the switch," because I was well on the way of cutting him up. And when he finally got out I said, "I am sorry. I didn't see you."

Well, he said, "I am sorry. I had no business being here. I have been here for about 10 minutes. I called for a truck and they haven't come after me yet."

Mr. Brewer: I did not quite understand one phrase there. Would you repeat that for me, please? [74]

(Answer read by the reporter.)

Q. By Mr. Brewer: Do you know, Mr. Scott, what was the nature of this territory in the sort of triangular section to the west of the place where the accident occurred off of the runway?

A. I think it was mostly grass and weeds.

Q. Was it level? A. Fairly so.

Q. Was it such a place or territory that a plane could run upon it, stand upon it?

A. Oh, yes.

Mr. Brewer: I think that is all at this time.

The Court: That is all.

(Witness excused.)

Mr. Lillie: Mr. Tucker.

TOMMY TUCKER.

called as a witness by and in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Tommy Tucker.

The Clerk: T-o-m-m-y?

The Witness: Right.

The Clerk: T-u-c-k-e-r?

The Witness: That is correct.

The Clerk: Two words? [75]

The Witness: Correct.

Direct Examination

By Mr. Lillie:

Q. Where do you reside, Mr. Tucker?

A. 6353 West 84th Place, Los Angeles 45.

Q. What is your occupation?

A. I am airport engineer for the City of Los Angeles.

Q. Are you employed by the City of Los Angeles?

A. That is correct.

Q. How long have you been employed in that capacity?

A. Since the first part of 1941.

Q. Have you been continuously employed in that capacity from that date until today?

A. That is correct.

Q. Where is your place of employment?

A. I didn't hear the last question.

Q. Where is your place of employment, the location?
Are you assigned—

A. (Interposing) At the Los Angeles Airport.

(Testimony of Tommy Tucker)

Q. What is commonly known as Mines Field in Inglewood?

A. No, In Los Angeles. I have to correct you.

Q. Is that in Los Angeles?

A. It is in Los Angeles, yes, sir.

Q. Do you know whether or not at any time the government took over control of that field? [76]

A. Not absolute control, no. They took over—may I add something?

Q. Yes.

A. They took over portions of it on which they built buildings. In those portions they had a lease giving them exclusive right to those portions. The balance of the field, commonly known as the landing area, they had joint right and use of it with other tenants.

Q. So that the United States Army was merely a tenant like anybody else on that field? A. Yes.

Mr. Lillie: That is all.

Cross Examination.

By Mr. Brewer:

Q. Were you there in 1941?

A. Was I there in '41?

Q. Yes. A. Yes.

Q. What time? When did you start working there?

A. I started there, I believe, the first of March in '41?

Q. I see. Were you there at the time of Pearl Harbor?

A. That's right. That is correct.

Q. And the Army moved in, then, and took over the field and you had to have a pass to get in from then on? [77]

A. That's right.

(Testimony of Tommy Tucker)

Q. And the Western Air Defense Command from the time of Pearl Harbor on had direct control over every flight from that field and onto that field, did they not, through the Civil Aeronautics Authority, first through their own authority and afterwards through the Civil Aeronautics Authority?

A. I think you have asked two questions there. It is a little difficult for me to answer.

Q. You may separate them, if you wish.

The Court: Mr. Reporter, give him the first part.

(The question referred to was read by the reporter, as follows:

("Q And the Western Air Defense Command from the time of Pearl Harbor on had direct control over every flight from that field and onto that field, did they not . . .")

The Witness: I would say they did, for a portion after Pearl Harbor. I can't tell you when that time actually cut off. I don't know to this day when they stopped having that control.

Q. By Mr. Brewer: But that control then passed to the CAA, or the Civil Aeronautics Authority, when they ceased to exercise that control?

A. I believe you are correct in that, although the CAA has a lease with the City.

Q. They have a lease with the City? [78]

A. For the airport traffic control tower, and I believe there is some reference made in there as to their so-called responsibility and control rights.

Q. And the tower is run by the Civil Aeronautics Authority, is it not?

A. Yes, it is.

(Testimony of Tommy Tucker)

Q. And they are the ones, the direct employees of the Civil Aeronautics Authority, they are the ones who regulate the traffic in the air around the field and in the landings and take-offs? A. That is correct.

Q. They also regulate, do they not, the traffic on the air field itself?

A. The air traffic and taxiing.

Q. That is what I mean.

A. That is correct.

Q. All movements about the field?

A. That is right.

Q. Now, you said they had a joint right and use of the field with the City during the war?

A. With other tenants.

Q. With other tenants?

A. Yes: Douglas, North American, and so forth.

Q. And Douglas also had rented portions of the field for their use at that time at November 11, 1943? [79]

A. That is correct.

Q. And North American had also, I suppose?

A. That's right.

Mr. Brewer: I believe that is all.

The Court: That is all.

Mr. Lillie: That is all, Mr. Tucker.

(Witness excused.)

Mr. Lillie: The government rests, your Honor.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you.

You will not discuss this matter among yourselves nor permit anyone to discuss it in your presence.

Do not express nor form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a short recess.

(Brief recess.)

The Court: Let the record show the jury are present and counsel are in court.

Mr. Brewer: Mr. Hansen.

OSCAR JOHN HANSEN

called as a witness by and in behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Oscar John Hansen. [80]

The Clerk: How do you spell your last name?

The Witness: H-a-n-s-e-n.

Direct Examination.

By Mr. Brewer:

Q. Speak loudly so we can all hear you, Mr. Hansen. Where do you live?

A. 5321 East Second Street, Los Angeles.

Q. By whom are you employed?

A. Douglas Aircraft Company at El Segundo, California.

Q. How long have you been employed by them?

A. Since May 1, 1941.

Q. What is your capacity there, sir?

A. I am an investigator in the Department of Plant Protection.

(Testimony of Oscar John Hansen)

Q. Were you in the vicinity of Mines Field on the date of the accident we have been litigating about here on November 11, 1943?

A. I was called there, yes, sir.

Q. Did you arrive there shortly after the accident?

A. I did.

Q. Did you inspect the planes when they were right together in their position as they were, following the impact?

A. I did.

Q. Will you just state in a general way how they were enmeshed or drawn together? [81]

A. The right wing of the Douglas SBD had struck the tail structure of the P-51 causing the SBD to whip or turn to the right, allowing the left wing of the SBD to pass over the top of the left wing of the P-51.

The propeller of the SBD was within a matter of inches from the fuselage of the P-51.

Q. Were there any skid marks or marks upon the pavement there to indicate the application of the airplane brakes of either plane?

A. There were.

Q. Where were they, sir?

A. They started immediately north of northeast of the tail section of the P-51.

Q. In what direction did they extend?

A. They extended southwest, and the left wheel of the SBD made a large circle facing nearly northwest.

Q. Where did the northwesterly end of that circle lead to? What object?

A. It led to the P-51 airplane.

Q. Was it close to the wheel of either plane?

A. Yes. The left wheel of the Douglas ship was within a few feet of the left wheel of the P-51.

(Testimony of Oscar John Hansen)

Q. Now, did you observe where the Mustang was with reference to the edge of the pavement so far as the wheels of that Mustang? [82]

A. I did.

Q. About how far was the right-hand wheel of the Mustang from the northwesterly edge of the pavement of Diagonal No. 22?

A. I would say about 30 feet.

Q. Did you cause some pictures to be taken of the scenes there at the time or immediately following the time you got there?

A. Yes, sir. I took a Douglas Company photographer with me, as is the custom with any crash or damage.

Q. You have looked over these pictures in the interim when we took this adjournment, have you not?

A. Yes.

Q. And the legends that you have on the back?

A. Yes, sir.

Q. Do you remember these pictures being taken?

A. I do.

Q. At the time, sir? A. Yes.

Mr. Brewer: Counsel has seen them.

Mr. Lillie: Yes.

Q. By Mr. Brewer: I want to show you, then, these pictures, which are now in evidence, I believe—

The Court: That is right.

Mr. Brewer: Are they in evidence, your Honor? [83]

The Court: They are in evidence.

Q. By Mr. Brewer: All right. I show you first Exhibit A-1.

(Testimony of Oscar John Hansen)

Will you observe the legend on the back and tell us what that picture represents and identify the objects in it?

A. The photograph shows both airplanes as they were after the collision before being moved.

Q. Now, the tail section, which is in the right-hand side of the picture—of which plane is that tail section?

A. That is the P-51 airplane.

Q. You see a walking man in the right-hand side of the picture. Where is that man? Close to what object?

A. He is close to the right-hand wing of the P-51 airplane.

Q. With reference to the edge of the paved runway, where is he with reference to that object?

A. He is walking within three or four feet of the edge of the runway.

Q. Now, is he on the runway or off of it?

A. He is on it.

Q. In other words, the right-hand wing, the end of it, did not reach to the edge of the pavement; is that correct, sir?

A. That is correct.

Q. Now, the next exhibit, No. A-2: will you take a [84] look at that and look at the legend on it and tell us what is shown and what the objects are in it?

A. This photograph was taken looking from the nose end of the P-51 airplane or looking northeast. The photograph was taken to show the damage to the P-51 wing which was caused by the radar antenna which extended below the SBD wing.

This photograph also shows the large skid mark of the left wheel of the Douglas ship.

(Testimony of Oscar John Hansen)

Q. That is the circular mark on the pavement, is that correct? A. That is correct.

Q. Now, the wing that extends toward us in this picture, the end of it, which plane is that?

A. That is the SBD.

Q. In other words, these two planes ended up with the SBD having the nose right up against the fuselage of the other plane and back of the wing of the other plane? A. That is correct.

Q. I show you Plaintiff's Exhibit A-3 and I ask you to look at the legend on its and the picture itself and tell us what objects are there shown.

A. That is a view of the nose end of the SBD taken before either ship was moved and shows damages to the right wing where it struck the tail section of the P-51 airplane. This photograph also shows a wheel skid mark right there (in- [85] dicating).

Q. A wheel skid mark. Was that leading up to any of the wheels of these planes?

A. I am not in a position to say.

Q. All right.

A. Whether it is or not.

Q. All right. Now, does that show the edge of the pavement there? Or can you make it out in that picture? A. No, you cannot.

Q. All right. By the way, what direction was this picture taken from?

A. That photograph is looking southeast.

Q. In other words, the photographer was standing on the runway or off of it?

A. Yes, he was on the runway.

(Testimony of Oscar John Hansen)

Q. On the runway. Now, we have an exhibit here, No. A-4. Will you look at that and tell us what that is supposed to represent?

A. This photograph was taken after the ships had been moved apart with a view of determining the damage, if any, to the fuselage or body of the airplane. There was a wrinkle or ding in the skin covering the ship.

Q. That is, the Mustang, is that right?

A. Yes, it is.

Q. All right, sir. I show you Exhibit A-5 and ask you [86] to tell us what that is, sir.

Look at the legend, too, will you, please?

A. A-5 shows the P-51 airplane after the two ships had been disentangled. It shows the damage caused by the radar rake of the left wing on the SBD.

Q. All right. That is Exhibit A-6. I wish you would mark which is the top of that. Will you mark "Top" with a pencil so we can get it right?

A. (Marking document)

Q. Thanks.

A. This photograph shows damage to the radar rake and the leading edge of the SBD wing. This would be the right-hand wing which struck the tail section of the P-51.

Q. All right, sir. Thank you. Will you mark the top of this, too, please, so we won't be misled?

A. (Marking document)

Q. Thanks. And tell us what that is, please. That is Exhibit A-7.

A. This is the nose section of the SBD taken to show damage to the propeller and/or the propeller blades, I should say. That is all.

(Testimony of Oscar John Hansen)

Q. That is all? All right, sir. Now, Exhibit A-8: Will you tell us what that shows?

A. This photograph shows the SBD wing, left wing, over the top of the P-51 left-hand wing and was taken before [87] either ship was moved.

Q. What are the objects on the ground, sir?

A. These are chunks of metal which were torn out of the P-51 wing which the radar rake passed through. It happened right in there (indicating).

Q. There is a light streak in the back of the picture. What is that, sir?

A. That is the far side of that runway.

Q. There is something setting back there. Do you know what that is?

A. That is North American's investigators who came out to photograph the same accident.

Q. It is a camera, is that correct?

A. That is correct.

Q. I see. Do you know where that is standing with reference to the paved edge of the runway?

A. I would say it is approximately in the center of the paved runway.

Q. The center of the paved runway?

A. Yes, sir.

Q. Thank you. Now, this is Exhibit A-9. Will you look at the legend and tell us what that shows?

A. It shows the underside of the SBD wing which passed over the top of the P-51 wing.

Q. Was this taken before they were moved, sir? [88]

A. That was taken before the ships were moved.

(Testimony of Oscar John Hansen)

Q. Did I ask you that same question about No. A-8? Was that taken before the ships were moved?

A. That was taken before either ship was moved.

Q. Thank you. And this other structure extending under that wing, is that the P-51 wing?

A. That is the P-51 wing.

Q. Thank you. I show you now Exhibit A-10. Will you look at the legend on that and look at the picture and tell us what the objects are in it?

A. This photo shows the P-51 airplane after the two ships had been disentangled. It was taken primarily to show damage to the tail section, horizontal stabilizer and the buckling of the metal forward of the horizontal stabilizer. This shot was taken before the ship had been towed away from the scene of the accident.

Q. Were you there when the two ships were disengaged?

A. I was.

Q. In disengaging the two ships, was the P-51 moved in any way?

A. No. It was necessary to back the SBD off of the P-51.

Q. So that that would correctly illustrate the position of the P-51 also at its position following the impact?

A. That is correct. [89]

Q. Now, I see a darker strip alongside of the paved portion that the P-51 is resting on. Will you tell us what that is with the white strip beyond it?

A. That is grass, and the white strip is an automobile roadway. That runs parallel.

Q. Now, the grass there: would that exhibit the edge of the paved portion of the Diagonal 22?

A. That would.

(Testimony of Oscar John Hansen)

Q. I show you Exhibit A-11, Mr. Hansen. I will ask you to look at the legend and tell us what it shows.

A. This photograph was taken before either ship was moved after the impact and shows again the SBD left wing over the P-51 left wing and was taken to determine the damage. This also shows a fire truck parked ahead of the P-51.

Q. Now, I want to ask you about that fire truck. Had the ships been moved at that time?

A. No, they had not.

Q. Was that fire truck on the paved Diagonal 22 runway? A. It was.

Q. I notice a sort of a dark streak there beyond this airplane, the wheels of the P-51 and a white streak beyond it. Will you tell us what that was again?

A. The dark streak designates the grass at the edge of the runway, and that white streak again is that automobile [90] roadway which runs parallel to it.

Q. Thank you. Now I show you picture A-12 and ask you if you recognize that and what is in it.

A. That photograph shows the P-51 airplane just before it was towed away from the scene of the damage. The ship had not been moved, although the tractor had backed up and hooked onto it.

Q. Now, does that picture correctly exhibit that both wheels of the P-51 were some distance in from the edge of the runway? A. They do.

Mr. Lillie: I will object to that on the ground it is assuming something not in evidence. If Mr. Brewer means after the impact, I have no objection.

Mr. Brewer: Well, of course, that is what I do mean, counsel.

(Testimony of Oscar John Hansen)

The Court: That is self-evident. Proceed.

The Witness: That shows the ship after its being pulled away from the point of impact.

Q. By Mr. Brewer: That is the P-51?

A. That is correct.

Q. That is A-13. Now I show you Exhibit A-14. Is that a picture taken before the ships were moved, sir?

A. That is correct.

Q. What is exhibited there, please? [91]

A. It again shows the position of the SBD wing over the top of the P-51 wing and underneath both airplanes you can see the edge of the runway, denoted by a dark streak there which is grass.

Q. All right, thank you. Now we have Exhibit No. A-15. I ask you to look at that, please.

What does that exhibit in there?

A. That was a long shot to show as much as possible the full size of both airplanes and the skid marks on the pavement. It shows the right-hand side of the SBD, and the nose section of the SBD within a matter of a few inches of the P-51. That is the propeller blades. Forward of both ships and to the right is parked the fire truck.

Q. Is that the same fire truck and in the same position as is shown in the other picture? A. It is.

Q. Thank you. That was taken before they were moved, was it not? A. That is correct.

Q. I show you now A-16. Will you look at that, please, and tell us what that is?

A. It shows the pavement and the wheel section of the SBD and also the tail of the P-51. It shows the brakes were applied by the Douglas pilot at about the time of impact.

(Testimony of Oscar John Hansen)

Q. This long circular black streak leads up to the [92] wheel of the SBD. What was that?

A. Well, that would be the tire or rubber burn where the wheel had skidded.

Q. Now, I show you Exhibit No. A-17. Will you look at that, please, and tell us what is in it?

A. That is the P-51 airplane, showing the damage to the left-hand wing after the ships were disengaged; and the far side or the edge of the runway can be seen between the mechanic and the wing.

Q. All right, sir. Was that before the P-51 was moved?

A. That's right.

Q. Now we have Exhibit A-18. Will you tell us what that is?

A. That is another long shot of both airplanes before either ship was moved. It was taken from the southeast looking to the northwest and shows the tail end of the fire truck and some of the moving equipment.

Q. Now I show you Exhibit A-19. I ask you to look at that, please, and tell us what is shown there.

A. That is looking from the southeast to the northwest. It shows both SBD and P-51 airplanes before they were moved and the distance from the right-hand wheel to the edge of the runway as shown.

Mr. Brewer: I would like to have this witness mark the two wheels of the P-51. Do you mind, your Honor? [93]

The Court: He may mark it.

Q. By Mr. Brewer: All right. Will you draw a line out to the left and mark "Left wheel of the P-51" there clear out into the white, please?

A. (Marking exhibit)

(Testimony of Oscar John Hansen)

Q. Just right out "left wheel."

A. That is the right wheel. I was mistaken.

Q. The left wheel, then, is not shown?

A. Yes, it is shown on this side.

Q. Oh! All right. Well, put out there in the same way and mark it "left wheel."

I show you a couple of pictures here and ask you if you recognize those. A. I do.

The Court: Have they been marked?

Mr. Brewer: No, they haven't.

The Court: Mark them for identification.

Mr. Brewer: Yes. Will you mark them, Mr. Cross?

The Clerk: Yes. Defendant's Exhibits B-1 and B-2 for identification.

(The photographs referred to were marked Defendant's Exhibits B-1 and B-2 for identification.)

Q. By Mr. Brewer: Were you present when these pictures were taken, sir? A. I was. [94]

Q. Do you recognize the scene in them?

A. Yes.

The Court: What is the witness referring to?

Mr. Brewer: Exhibits B-1 and B-2.

Q. Are they the same? A. They are the same.

Q. What scene is it that is represented by this picture?

A. These photographs show the width of the main runway or landing strip. That is the large one (indicating).

Q. Is that the diagonal?

A. No, that is not the diagonal.

Q. That is the big one? A. That's right.

Q. I see. All right. And when were they taken?

(Testimony of Oscar John Hansen)

A. They were taken, oh, within two hours after the accident occurred on the field.

Q. The same day? A. The same day.

Mr. Brewer: All right, sir. We will offer them in evidence, your Honor.

The Court: In evidence.

The Clerk: Exhibits B-1 and B-2 in evidence.

(The photographs referred to were received in evidence and marked Defendant's Exhibits B-1 and B-2.) [95]

Mr. Brewer: You may cross examine.

Cross Examination.

By Mr. Lillie:

Q. Did you take these pictures, Mr. Hansen?

A. No, sir.

Q. You did not? A. I did not.

Q. Were you there at the time they were taken?

A. I was.

Q. Were they taken simultaneously, one right after the other?

A. One right after the other.

The Court: I am sure the jury are not hearing those questions.

Q. By Mr. Lillie: I notice that one is much darker than the other. Can you account for that? Is that by reason of the photographer?

A. I am not an expert photographer, sir. I couldn't honestly answer you that.

Q. You are not an expert photographer. Do you know whether or not this picture taken here is of the main runway, which is 300 feet, or the runway upon which the accident happened?

(Testimony of Oscar John Hansen)

A. That is the main runway.

Q. That is not the runway upon which the accident hap- [96] pened?

A. I am pretty sure it is not.

Q. Well, now, do you know?

A. I won't say that I do know.

The Court: A little louder. I am sure the jury cannot hear you.

The Witness: I won't say that I do know.

Q. By Mr. Lillie: So you don't know whether or not that picture represents the main runway or the runway upon which the accident occurred?

A. That's right.

Q. How long after the accident did you arrive at the scene, Mr. Hansen? A. Within 10 minutes.

Q. You don't know how far the planes had been moved by reason of the collision? A. No, I don't.

Q. I will show you the Government's Exhibits 3-A to 3- —

The Clerk: 3-X.

Q. By Mr. Lillie: (Continuing)—to 3-X. Will you look them over and tell me if they represent a fair reproduction of the pictures that you took of the scene of the collision and the position of the planes?

A. This was before either— [97]

The Court (Interposing): I do not think that question is proper. Read the question.

(Question read by the reporter.)

The Court: Not a reproduction of his pictures.

Mr. Lillie: I will reframe the question.

The Court: It is a fair representation of the scene as he saw it.

(Testimony of Oscar John Hansen)

Q. By Mr. Lillie: A fair representation of the scene as he saw it and as taken in your pictures?

The Court: "And as taken in your pictures" should be stricken out.

Mr. Lillie: Very well, it may go out.

The Court: This is to find out whether or not this is a true representation as near as he remembers it of the scene at the time that he arrived.

The Witness: I would say they were.

Q. By Mr. Lillie: Thank you. It is stipulated that these were taken within 15 to 20 minutes after the accident occurred. Would you say that on an average they represent the true visibility as could be reproduced by a picture? A. I do.

Q. I call attention to Government's Exhibit No. 3-N and ask you whether or not that will help you to recollect what color the air strip was.

A. I can't truthfully say. [98]

Q. These pictures will not tell either, will they?

A. No.

Mr. Lillie: Thank you. That is all. May I pass these to the jury, your Honor?

The Court: Yes, you may.

Mr. Brewer: May we pass the others to the jury at the same time, your Honor?

The Court: Yes.

(Witness excused.)

Mr. Brewer: I do not think I will pass those, your Honor. He says he is not sure. In fact, with your consent, I will withdraw them.

Mr. Lillie: Very well, your Honor.

The Court: Call your next witness.

Mr. Brewer: I want to call Mr. Buckles, please.

ROBERT E. BUCKLES,

called as a witness by and in behalf of the defendant, under Rule 43-B, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert E. Buckles.

The Clerk: How do you spell your last name?

The Witness: B-u-c-k-l-e-s.

Mr. Brewer: Your Honor, we are calling this witness under Rule 43-B as an agent of an adverse party. [99]

Direct Examination.

By Mr. Brewer:

Q. Where do you live, Mr. Buckles?

A. 118 East 105th, L. A.

Q. A little louder, will you, please?

A. 118 East 105th, L. A.

Q. By whom are you employed?

A. United States Civil Aeronautics Administration.

Q. That is a branch of the United States Government, is it not?

A. Correct.

Q. How long have you been employed by them, Mr. Buckles?

A. Since January, 1942.

Q. Have you been stationed at Mines Field in Los Angeles since that time?

A. Well, up to July, 1944. I had "Greetings" from the President.

Q. You say you are not there at present?

A. No. Well, I am there now. I was in the Army two years.

Q. Yes. All right. And what was your capacity there at Mines Field after you came there?

A. Tower operator.

(Testimony of Robert E. Buckles)

Q. Sir? [100]

A. Tower operator.

Q. Were you in charge of the tower there?

A. No, just in charge of a shift.

Q. One shift? A. That is correct.

Q. How many shifts do they have?

A. We had three.

Q. Three? A. Yes.

Q. So that there was someone on hand at all times in the tower. Where is the tower located at that field, Mr. Buckles?

A. At the time of the accident it was on the south side. It is on the north side now.

Q. Do you see the diagram on the board from where you are? A. Yes.

Q. Was that in the administration building, the tower?

A. That is where it used to be, yes.

Q. At that time, at the time of this accident on November 11, 1943, it was in this administration building to which I am pointing?

A. That is correct.

Mr. Brewer: Could I shade this in, your Honor, just to identify what I was pointing out? [101]

The Court: Yes.

Mr. Brewer: I will shade it in with red pencil.

Q. Where was the tower located in that building?

A. It was on the very top floor.

Q. From the tower could you look out and see the field when visibility was very good?

A. We could see most of it, yes.

Q. Could you see all of runway 25-R, as it is now designated? A. Yes.

(Testimony of Robert E. Buckles)

Q. Could you see all of runway 22, the diagonal, as it is now designated?

A. Yes, you could—

Q. Sir?

A. Yes, you could see the full length of that.

Q. How about the main runway 25-L?

A. You could see it.

Q. You could see all of that, couldn't you?

A. You could see the entire length of that also, yes, sir.

Q. All right. Now, in the tower there at that time you had radio equipment, did you not?

A. Correct.

Q. Tell us about that radio equipment. How was it managed and how was it tuned in so far as being able to use [102] it in connection with your work there?

A. We had a transmitter that transmitted on 272 kilocycles.

Q. A little louder, please, Mr. Buckles.

A. Yes. We transmitted on 272 kilocycles which was the frequency assigned by the Federal Communications Commission. We received 3105 which happened to be the frequency that Mr. Scott was transmitting on the SBD. We also received 4495, 126.18 megacycles, 3117- $\frac{1}{2}$ and 6210, other frequencies on request.

Q. Now, do you recall those frequencies that you have stated, how they were used in so far as separation of the different types of planes that used the different frequencies? Do you recall that?

A. Well, see, you could say that the Navy used 3105 more than any other frequency.

(Testimony of Robert E. Buckles)

Q. Yes?

A. And some of the Army used 6210, 4495 and 126.8 megacycles.

Q. In other words, they were on a different frequency than the Navy?

A. Well, not necessarily, no. Well, some of the Navy ships transmit on 126.18 megacycles, also transmit on 6210. Let's see. I believe the A-24, which was the Army version of the SBD, also transmitted on 3105. I wouldn't be certain of [103] that. I don't remember.

Q. Well, take it this way, then: How did you know when a call was going to come in from one of these various frequencies?

A. Well, I would never know. You just simply listen for it.

Q. Well, you would hear all calls then?

A. Well, normally you would hear calls all over the area, and you might hear them skip beats clear to New York, so far as that goes.

Q. Well, what I am getting at is this: Was the receiving instrument that you had in your tower tuned to any particular band?

A. Yes. That is what I said. They were tuned to those various frequencies.

Q. Each one of them at the same time?

A. Yes, that is correct.

Q. So you could hear them all at the same time?

A. That is correct.

Q. Could you tune any of them out?

A. No, we wouldn't do that.

Q. You would not do that? A. No.

Q. You could hear them all? A. Yes, sir. [104]

(Testimony of Robert E. Buckles)

Q. So a fair statement to make is that you were in contact with the planes in your area and for some distance beyond?

A. Yes, you might say that. However, say two aircraft would call on the same frequency. Then somebody would have to call over again because if they had called on the same frequency, they would block each other out.

Q. You would get a mixture of voices?

A. No. I would just simply make a squeal.

Q. It would make a squeal? A. Yes, sir.

Q. All right. Well, then, did you keep any records of your conversations with planes out there?

A. Everything we transmitted is recorded, was and is.

Q. That is, the out-going part of the conversation?

A. That is correct.

Q. Was the in-going part of the conversation recorded? A. No.

Q. How was that recorded?

A. We have dictaphone recorders up in the tower. The records are small loops; so every time we transmit, we hit the microphone button and it automatically starts a record and starts recording our conversation.

Q. Now, as to planes approaching that field to land, did you control their flights, their approach and their landing by instructions from the tower? [105]

A. Yes, that is correct.

Q. That was true on November 11, 1943, was it not?

A. Correct.

Q. So that no plane could approach and land there without following the instructions which you gave them?

A. They were supposed to, yes.

(Testimony of Robert E. Buckles)

Q. And you also controlled the traffic on the field yourself, did you not?

A. Yes, that is correct.

Q. By radio and other instructions? A. Yes.

Q. And the planes, all the military planes, were equipped with radios which were capable of tuning in the frequencies you used?

A. No, I wouldn't say that. Anybody that had a receiver on 204 band could receive the tower because there were no civilian aircraft at that time.

There were no civilian aircraft using the air at that time, were there? A. No.

Q. Do you know why that was?

A. Yes. On December 7th we were attacked at Pearl Harbor, and at that time the Western Flight Command put through the regulation that no civilian aircraft shall fly within the boundaries of a certain area, and that area extended [106] east farther than the State of California.

Q. Yes, sir. Now, a plane taking off was also under your control from the tower? A. Yes.

Q. Giving instructions on what to do in taking off?

A. Yes, that is correct.

Q. When the plane landed or took off, you told him what portions of the field to use in taking off, did you not?

A. We gave him clearance to do so, yes. We didn't tell. We gave him clearance to do so.

Q. Well, just explain that phrase to us.

A. Well, "clearance" is, I guess you could define it, giving permission to do so.

(Testimony of Robert E. Buckles)

Q. In other words, the Civil Aeronautics Authority controlled traffic of the airplanes in and out of that airport at that time and during the time you have been there? A. Yes, that is correct.

Q. Do you remember this accident? You remember this accident, don't you?

A. I remember it fairly well, yes.

Q. The Mustang, P-51, planes that they were using there at that time were equipped with radios, weren't they? A. Yes.

Q. And the one that was in the accident was equipped [107] with a radio so that you could talk to him? A. Yes, that is correct.

Q. He had cleared from that field that day, had he not? A. Yes.

Q. And, of course, the Douglas SBD had also cleared from that field that day, had it not? A. Yes.

Q. And you talked to them on the radio?

A. Yes.

Q. Now, we have subpoenaed some records of the Civil Aeronautics Authority of the Department of Commerce with reference to the conversations had that day, and there was a transcript made up from it, was there not? A. Yes.

Q. Have you compared this transcript with the actual recording there, sir?

A. Well, the first transcript I was right there helping out when we made it and—(Pause)

Q. Well, would you look at this and see if this is the one to which you are referring?

A. (Examining document)

Q. This is another sheet of it. A. That's it.

(Testimony of Robert E. Buckles)

Q. Does that transcript appear to be a correct trans- [108] cript, then, of the conversation with the tower? A. It appears so, yes.

Q. You were in charge at that time, weren't you?

A. In charge of the shift, yes.

Q. This transcript, then, is a recordation or is a transcript of the recordation of the voices that went out over the radio prior to the accident?

A. Yes, that's right.

Q. Of course, it does not contain the replies of the pilot, does it? A. No, no.

Mr. Brewer: We would like to offer this in evidence, your Honor, as our next exhibit.

The Court: In evidence.

The Clerk: That will be Defendant's Exhibit C in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

Q. By Mr. Brewer: I will ask you to follow me with this Defendant's Exhibit C, then, please. I have a copy of it here. A. Okay.

Q. You have up here at the top "November 11, 1943, 1407 Pacific—Actual Time of Accident."

What do you mean in clock time? [109]

A. That means 2:07 Pacific Time.

Q. Two what?

A. 2:00 o'clock, seven minutes after 2:00 o'clock in the afternoon Pacific Time.

Q. That was the time of the collision? A. Yes.

Q. All right. Then you have the first entry:

"(To P-51)"?

A. Yes.

(Testimony of Robert E. Buckles)

Q. Is that the P-51 that Mr. Pitcairn was flying?

A. That is the P-51 that Mr. Pitcairn was flying.

Q. Now, will you take that first entry there, the first four lines there, and read them to us and explain each line as you read it?

A. Yes. First it was: "Army 093. West of the field 2500 cleared to enter the traffic pattern, runway 25. Call base leg. Over."

The "over" means for him to come back with a reply.

Q. Now, with reference to that statement, just to make sure we understand it, sir, that is what was said by the tower to the P-51?

A. That was said by me, yes.

Q. Sir? A. Yes, that is correct.

Q. And you have sort of a special language of your own, [110] don't you, in abbreviation of what you have to say to the pilot; isn't that correct, sir?

A. Well, I guess you would call it abbreviation, yes.

Q. "Army 093" means the number of the plane, does it? Or what?

A. Yes. There was a longer number for the aircraft. 093 were the last three numbers which the pilot was using for a call number. That was all we were required to use, was the last three numbers.

Q. I see. Then the words "West of the field 2500 cleared to enter the traffic pattern," just what does that mean?

A. He was west of the field; his altitude was 2,500 feet.

Q. What do the words "cleared to enter the traffic pattern" mean?

A. We had a traffic pattern, which is the flight of the aircraft in the control zone of the airport. It is

(Testimony of Robert E. Buckles)

the air space which we have to control in the airport. At that time it was three miles from the center line; so we had a definite flight pattern for them to fly which all pilots at the field knew about. So I gave him clearance, permission to enter the traffic pattern. That was to enter the traffic pattern for runway 25 which was the main runway at that time.

Q. That was the main runway at the time? [111]

A. Yes, that is correct. It was not called "25-L" at that time.

Q. Well, let us make that clear, please. When you told him "runway 25" you meant this runway A that I am pointing to here?

A. Yes. That was called runway 25.

Q. And it is now called 25-L?

A. Yes. It has been changed.

Q. All right. So that meant he was to enter the traffic pattern and get ready to land.

A. For the main runway.

Q. The main runway?

A. Uh-huh. And then I had him as a check for his position in case some other aircraft had beat him into the traffic pattern, or something like that, to advise me on base leg, in other words, his leg just before he turned in to land. I asked him to call me on base leg, and I came back with "over" for him to reply if he received it okay.

Q. Do you recall what he said in reply?

A. Well, he probably came back and said, "Los Angeles Tower, Army 093. Roger."

Q. What does "Roger" mean?

A. That means that he received.

(Testimony of Robert E. Buckles)

Q. He is hearing you all right and he understands it?

A. He received his instructions okay. [112]

Q. Now, I was curious about this next entry. It says "105 Los Angeles Tower. Cleared to runway 25."

What does that mean, sir?

A. Well, if we happened to hit the mike button a little too fast, it takes the recorder a little time to pick up, so that actually that could have been Army 105 or it could have been Navy 105. So the first part of that was evidently chopped off, and it never got on the recorder. It went out through the air but the recorder wasn't turning around.

Q. What I was getting at, was that another plane that was talking?

A. That was another aircraft that called.

Q. And it says following that, "Cleared to runway 25." Now, what did that mean?

A. In other words, that aircraft was going to take off, and I cleared him to the head of the runway to take off.

Q. I didn't quite hear you, sir.

A. I say that the aircraft had evidently called me for permission to take off; so I cleared him to the head of the runway 25 for take-off, the main runway.

Q. Well, there are about two and a half sheets of this here. How long did all of this take, in point of time, all of these entries that you have brought here?

A. Well, that is rather hard to state, it's been so [113] long. I can't remember. However, I will state that one record will carry 30 minutes of continuous conversation. In other words, one loop or record will record 30 minutes of continuous conversation.

(Testimony of Robert E. Buckles)

However, if there is an interval between your different contacts why, of course, they all run together. In other words, 30 minutes of actual conversation could run over a period of an hour and a half. Or if you were talking all the time, like we do now once in a while, why, it could use up in 30, 35 minutes.

Q. The machine stops recording when you are not using it? A. Yes, that is correct.

Q. Then you have "095 Los Angeles Tower. Cleared to runway 25. Over."

That is the next entry.

A. Yes. That was another aircraft going to take off.

Q. And that was the same runway, then, that the Mustang, the P-51, was going to come in on?

A. Correct.

Q. Now, the next entry: Will you read that and explain it to us, please?

A. Yes. At that particular time there was a B-17 that was piloted by an Army pilot. It was coming into Los Angeles. He was unfamiliar with the area. He advised that he had the field in sight; he was wanting to land at Los [114] Angeles Airport. So I advised him that he was over the field, as it states here. As soon as he was over the field and wanted the landing instructions, I came back and I said—the Army part is chopped off here—"Army 0758. This is Los Angeles Tower. Over the field, cleared to enter traffic pattern, runway 25. Call base leg . . ." And I came back and I gave him the traffic in the air.

"Traffic is a B-25 now turning on base leg and a P-51 on down wind (leg)."

(Testimony of Robert E. Buckles)

Q. What do you mean by "base leg," sir?

A. Can I show you on the map?

Q. Yes, if you will.

A. We land all aircraft into the wind, naturally.

Q. Yes, sir.

A. So if an aircraft—now, this is the air space above it (indicating).

Q. Will you kind of face the jury?

A. This is the air space above the field. We are looking down at the field straight from a vertical position. So we will draw a three-mile radius from the center line of the airport, and that is the control zone that the tower took care of. So then we had a traffic pattern. If an aircraft would enter right about here, or he could enter any part of that leg, that leg we called the "down wind leg." In other words, if the wind was blowing in this direction and he [115] landed into the wind then they were down here, it would mean they were going down-wind. So this is the down-wind leg, and in a rectangular pattern he would come here and turn here. When they turn here, it would be their base leg; and when they turn here, it would be their final approach.

So the reason we always had them on base leg or down-wind leg was maybe there would be some aircraft that would be delaying for his take-off. Maybe he had a little trouble getting in his position. We would have him advise. So maybe we would have to change him to run 25 right, or as the case may be, this aircraft I cleared for 25: "Advise base leg." So supposedly in that case the aircraft would get on base leg, and then we would either change his flight path for him

(Testimony of Robert E. Buckles)

to land on 25 right or clear him to land on the runway that we had already cleared him for. That is the leg. This leg going across here is called the cross-wind leg. We never use that.

Q. In other words, you advised them of the other traffic in the air or the other traffic on the field if there was some moving traffic or some traffic on the field, as a rule? A. That would—

Q. That might affect their passage on or off the field?

A. That's right. It would depend on our judgment how it would affect their passage. [116]

Q. Yes. Now, skipping down a little ways there, you have something "(To P-51.)"

Will you read that, please, and explain it to me.

A. Okay. This is also Mr. Pitcairn, and he has now gone on his base leg in the traffic pattern. He advised—he possibly came in this—he said, "Los Angeles Tower. This is 093. Base leg."

Then I came back with this last remark:

"093, Los Angeles Tower. Over. 093 Roger Wilco. Navy 305. Cleared to runway 25."

In other words, I had cleared up my traffic on the runway; so he had been given permission to land on the main runway.

Q. Then you have right after that entry another one to a Navy ship. A. Uh-huh.

Q. What does that mean, sir?

A. That is "Navy305. Cleared to runway 25."

It was another aircraft that was going to take off.

Q. That was the same runway? A. Yes.

(Testimony of Robert E. Buckles)

Q. Was there some interval of time? Or where was that ship?

A. That aircraft was on the ramp, and he wanted permission to taxi out on the runway. [117]

Q. Where would that ship be, sir?

A. I will show you. In other words, at that time we had aircraft parked all over the field. Douglas parked a lot of their SBD's in here. They also had some parked on a parking space which is right here (indicating).

Q. On runway C you indicated is where they had some parked?

A. Yes, they had some parked. And this aircraft called me at the tower and asked for permission to taxi to runway 25. When the aircraft called me I would say, "Navy 302. Cleared to runway 25." And he would taxi to here (indicating) and we would have several aircraft holding here and clear them.

Q. That is what we call the taxi way on the edge of the field? A. That's right.

Q. All right, sir. Now, you have another entry there, sir, the next entry being "R-716." Will you read that and explain that to us, please?

A. Yes. That "R" means Army which is—

Q. That means Army? A. Yes.

Q. All right.

A. Somebody in transcribing this put the "R" instead of the full word. So we have Army 716. He was evidently asking where the transient Army parking area was; so I came [118] back and said "Army 716, the transient parking area is behind the large hangar in the southwest corner of the field."

(Testimony of Robert E. Buckles)

Q. That was for someone who was not acquainted with the field?

A. That is correct, a transient aircraft.

Q. Now, will you explain the next entry there, "Navy 519"?

Read that to us and tell us what it means.

A. Well, it is rather hard to say what that is exactly because we don't have the first part of the transcription here. But evidently, gathering from what my conversation states there, it was an aircraft that was ready for take-off, and he asked for take-off. So I came back and I said:

"Navy 519, Los Angeles Tower. Hold your position. I have P-51 final approach."

So I held him because I had a P-51, and I couldn't allow him to take off because there was a P-51 on final approach.

Q. And that P-51 was Mr. Pitcairn's plane, wasn't it?

A. From the rest of it, I would say that it was Mr. Pitcairn's plane. But, as I said, I couldn't be certain because I can't remember back that far.

Q. Well, 093 was Pitcairn's plane, wasn't it?

A. Yes, that is correct.

Q. Yes. All right, now, what are the next two entries there? Could you tell us about those, please: "449"? [119]

A. Yes. There was evidently an aircraft that was going, or had filed a flight plan to Bakersfield; so we evidently didn't have his elapsed time, in other words, the elapsed time of his flight to Bakersfield. So I asked

(Testimony of Robert E. Buckles)

him—of course, again, the first part is blocked off here, chopped off. I can't tell whether it is Army or Navy. But I came back and said: "449, Los Angeles Tower. What will be your elapsed time to Bakersfield?"

Then he told me what it was, and I came back: "Roger. 50 minutes."

Q. What is the significance of that remark: "Roger. 50 minutes"?

A. "Roger, I received your transmission correctly, and it is 50 minutes." I was reaffirming what he said.

Q. It is true, is it not, that each flight must be plotted and filed with you before they take off

A. Well, it was true at that time more or less, yes.

Q. And you had to approve the flight plan, did you not, or the Civil Aeronautics Authority had to?

A. Yes.

Q. Before?

A. That is correct.

Q. That is, the entire flight taking off from the airport to the destination?

A. Yes, other than our test ships. [120]

Q. Yes. The test ships just flew in a restricted area near the airport, did they not?

A. Yes. I am not quite certain at this time. We had had various ways of getting them out. Sometimes we would call up in the morning and get a blanket clearance for the test area. But I am not quite certain how it went at the time.

Q. In other words, when a plane went up for a test, it had a definite flight pattern which it followed in that test?

A. No, I wouldn't say that, no.

(Testimony of Robert E. Buckles)

Q. Over a certain area?

A. It had a certain area to conduct its tests, yes.

Q. Yes. Now, then, the next: "Army 716. Roger. Wilco." Just what is that?

A. "Army 716, received your message correctly," that we would conform with whatever he asked for.

Q. Will what?

A. Well, now, if you look back here, this Army 716 was this aircraft that requested going to the transient parking area.

Q. Yes.

A. So he probably came through—now, I am just surmising because I don't remember; I am surmising that he asked us to close out his flight plan. So I said, "Roger. Received your message okay. Will close out your flight plan." [121]

Q. Oh, yes. All right, now, the next entry says:

"(To P-51)—093 cleared to the ramp."

Was that a communication from you to the plane which Mr. Pitcairn was flying?

A. That is correct.

Q. Where was that plane at that time?

A. We usually caught them as they were still on a straight course down the runway, rolling, and we would tell them, "cleared to the ramp."

Q. Do you recall a conversation with Mr. Pitcairn in the air with respect to what he was going to do and where he was going to go, or anything of that sort?

A. I don't, other than what I would surmise from the transcription here. The only thing I can see here is the landing instructions. We don't have the transcription before this; so, as I say, I can't remember what went on before that.

(Testimony of Robert E. Buckles)

Q. Is there one before this?

A. Well, this is the whole record, yes.

Q. I mean would the other one contain any further conversation with Pitcairn?

A. That is rather hard to say. It may and it may not.

Q. Could you check that readily this evening or before court tomorrow?

A. Well, the trouble is we are using all our re-
[122] corders all the time. It would be rather hard.

The Court: Is that very material, Mr. Brewer? It is after the planes got there that we are particularly interested in.

Mr. Brewer: Well, possibly so, your Honor.

The Court: Yes. I do not think that is material. After they got down is what we are interested in.

Q. By Mr. Brewer: What does this expression "cleared to the ramp" mean?

A. I was giving him permission to taxi to the ramp.

Q. Where was the ramp?

A. The ramp was what we classified—what we classified the ramp at that time was any parking area.

Q. Where was the parking area?

A. As I said before, Douglas had permission from the City to park their aircraft on the taxi-way "C," as it is known there, and also on the wide ramp there right in front of the control tower and hangars.

Q. This loading apron; is that what you mean?

A. Yes, that is a ramp.

Q. And this Runway C? A. Yes.

Q. And any others?

A. That is all the ramps we had at the time. I believe there were a few more parking areas around the field, [123] but that is all that is—(Pause)

(Testimony of Robert E. Buckles)

Q. When you said "cleared to the ramp," then, that meant this area here (indicating)?

A. Yes.

Q. Did it not?

A. Yes. In other words, that meant for him to follow the taxi patterns that we had laid out and go to the ramp.

Q. It did not meant to park on runway 22 then?

A. No.

Q. Now, you have on the next page there "(To SBD)." It is right about the middle of the page.

A. Uh-huh.

Q. Will you look at that, please? A. Yes.

Q. Does that indicate the first communication with that airplane, the SBD, Navy 302?

A. That is the first indication I have of any transmission to that aircraft, according to this record here, yes.

Q. All right. Will you read that and tell us just what it means, please?

A. Yes. Mr. Scott's call numbers were "Navy 302." "Navy 302 down-wind leg, cleared to land runway 25-R. I have an aircraft final for 25."

Q. Those are the words you spoke to Mr. Scott over the radio after connecting with him? [124]

A. Yes.

Q. Just what did that mean, sir? You said "down-wind leg, cleared to land runway 25-R." What does that mean?

A. Okay. That meant that he had called me on the down-wind leg, and I have previously explained where the down-wind leg was. And at that time it appears that I had traffic landing on 25, but I had no

(Testimony of Robert E. Buckles)

traffic landing on 25-R. So I cleared Mr. Scott to land on 25-R.

Q. In other words, your final remarks "I have an aircraft final for 25" means that you had some aircraft landing on 25 at that time and he was to go to 25-R?

A. Yes. It means that there is an aircraft on final approach for 25, or putting it in other words, there is an aircraft on final approach for the main runway.

Q. When you say "final approach" does that mean take-off or landing?

A. No, that is on landing. That is the leg after the base leg.

Q. Further down on that same page it says "(To SBD)—Navy 302. Cleared to the ramp. Hold north of the main runway."

Did you say that to Mr. Scott?

A. Yes, that is what it says.

Q. Then on the third page, will you look at that at the top of the page? It reads: "(To SBD)—Navy 302. Cleared [125] to cross main runway."

A. Uh-huh.

Q. Did you say that also to Mr. Scott?

A. Yes, that is correct.

Q. Do you recall what his replies were to those two statements? A. No. No, I don't.

Q. At any rate, where you say "cleared to cross main runway," that was this runway A, was it not?

A. Yes, that is correct.

Q. This is the total conversation, so far as the records show, from the tower to Mr. Scott as he approached in the landing pattern and landed at the field up to the time of the accident? A. Yes.

(Testimony of Robert E. Buckles)

Q. Were you aware of this P-51 being parked on runway 22?

A. To get back to this one transcription we passed over here "(To P-51)" on page 2—

Q. Yes, sir?

A "093. Los Angeles Tower over"

That was at the time Mr. Pitcairn called for a tractor, and I came back:

"093 Roger Wilco."

In other words, I received his message and would con-[126] form to what he asked.

Q. Do you know how much time elapsed between that time and the time that you cleared Mr. Scott's plane to land on runway 25-R?

A. No, I couldn't say.

Q. All right. Well, at any rate, when you had this communication here with the P-51, Mr. Pitcairn, "093 Los Angeles Tower over. 093 Roger Wilco," was he on the field at that time?

A. Yes.

Q. He had landed?

A. That is correct. He was—

Q. And these Douglas planes were being tested at that time? You were familiar with that fact, were you not?

A. Yes.

Q. Quite a few of them?

A. Yes.

Q. Isn't it a fact that they usually came in when there was wind from the west like that (indicating), came in and came up the diagonal to the parking ramp?

A. We had some taxi patterns at that time that showed no aircraft were to taxi down that without permission from the tower.

(Testimony of Robert E. Buckles)

Q. When you stopped him at the main runway there, according to this record, you knew at that time that he was on [127] No. 22, the diagonal?

A. Yes. I could plainly see the aircraft, yes.

Q. You could plainly see it?

A. Yes, that's right.

Q. Yes. And you were aware also, were you not, that the P-51 had stopped there when you got this other call, "Los Angeles Tower over. 093 Roger Wilco," that you mentioned?

A. Yes, that is correct.

Q. That came, in point of time, before Mr. Scott was cleared to land on the runway, did it not?

Will you look at that second page there?

A. Yes, that is what it shows here, that the P-51 was already parked when Mr. Scott landed.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you.

You will not discuss this matter among yourselves or with anyone.

Do not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

We will now take a recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:35 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, May 14, 1947.) [128]

Los Angeles, California, May 14, 1947,

10:00 o'clock A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. 6074 Civil, United States vs. Douglas Aircraft Corporation, Inc., a corporation, for further jury trial.

Mr. Lillie: Ready for the Government.

Mr. Brewer: Ready for the defendants.

The Court: Let the record show the jury are present. Proceed, gentlemen.

ROBERT E. BUCKLES

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Brewer: May I have the last question and answer read, please?

(The record referred to was read by the reporter, as follows:

("Q. That came, in point of time, before Mr. Scott was cleared to land on the runway, did it not? Will you look at that second page there?

(A. Yes, that is what it shows here, that the P-51 was already parked when Mr. Scott landed.")

Direct Examination (Resumed)

Q. By Mr. Brewer: Were you aware then in the tower [130] that he had not, therefore, cleared on to the ramp as his prior instruction had been?

A. Yes, that's right.

(Testimony of Robert E. Buckles)

Q. You were aware of where he had parked; that it was on the runway?

A. On the edge, yes.

Q. When you cleared Mr. Scott to cross the main runway, you knew he was pursuing a course down the diagonal runway, the same one on which the P-51 was parked?

A. Yes, that is correct.

Q. Do you recall this accident, Mr. Buckles?

A. Yes, I recall it.

Q. Do you know or do you remember, rather, how long the P-51 was parked there before this accident occurred?

A. No, I don't remember that.

Q. What was the procedure you used in summoning a tractor to pull the airplanes in? Do you recall?

A. Well, that was more or less a supplement to our duty. Usually there is two or three of us working, and—

Q. That is, on the same shift there are two or three of you in the room there?

A. Yes, that's right. So we usually, if we had plenty of time, called them immediately on the telephone.

Q. Yes?

A. Or as soon as possible. [131]

Q. In other words, one of the three of you would call?

A. Yes, the one that wasn't busy.

Q. Do you recall whether that call had been placed or not on this occasion?

A. No, I don't recall.

Q. The Civil Aeronautics Authority is a branch of the Department of Commerce of the United States Government, is it not?

A. Yes.

(Testimony of Robert E. Buckles)

Q. And you receive your paychecks from the United States Government? A. Correct.

Mr. Brewer: You may cross examine.

Cross Examination

By Mr. Lillie:

Q. I wish you would clarify this for me a little, Mr. Buckles.

I wonder if you would be kind enough to take the Defendant's Exhibit C in evidence and turn to page 2.

A. (Examining document)

Q. Go to page 1. I believe it is page 1. The last direction you gave to the P-51 was, "cleared to the ramp," is that correct?

Mr. Brewer: It is on the second page.

The Witness: Those are the last directions, yes. [132]

Q. By Mr. Lillie: Now, on page 2 I see "(To P-51—093 Los Angeles Tower over. 093 Roger Wilco.)"

Is that the time he asked you for the tractor?

A. That was the time that he asked for the tractor, yes.

Q. The next communication with either of the planes was to the SBD, not counting the other planes that are interspersed in here in your directions to them. It says:

"Navy 302 down-wind leg, cleared to land runway 25-R. I have an aircraft final for 25."

Was that an instruction to the SBD?

A. Yes. That was an instruction to Mr. Scott to land on 25-R.

Q. Will you show us 25-R? Show the jury, rather. so that — (Pause)

(Testimony of Robert E. Buckles)

A. This runway here is 25-R. The "R" stands for "right." In other words, it's right of this one right here (indicating).

Q. The next statement on page 2 there is:

"Navy 302 cleared to ramp. Hold north of the main runway."

Is that your next instruction to Mr. Scott?

A. That was the next instruction.

Q. Would you turn around, please, and face the jury?

A. That was the next instruction to Mr. Scott. [133]

Q. Now, what did "hold north of the main runway" mean in your language of the CAA control tower work?

A. That meant for Mr. Scott to come to a stop before crossing the main runway, which is this runway here (indicating), come completely to a stop and hold for further instructions.

Q. All right. Will you take the stand, please?

Thereafter did Mr. Scott hold north of the main runway?

A. Mr. Scott held north of the main runway. However, he made a turn on the diagonal runway, or taxiway, as it was used for that purpose then.

Q. Do you have a traffic pattern there on the field also as well as in the air?

A. Yes. We have a taxi pattern for the field as well as the traffic pattern in the air. In other words, in the air if we tell an aircraft "clear to enter traffic pattern," he knows, according to the field rules, that he is to make a left traffic pattern, unless he has other instructions from us. And the same holds true with the taxi pattern on

(Testimony of Robert E. Buckles)

the field. Without any supplemental instructions, he shall follow the taxi pattern.

Q. What was the taxi pattern on the field with respect to Mr. Scott's landing position, if you know?

A. Yes. On 25-R the taxi pattern was to continue to the end of the runway, the very end, and then make a left [134]

Q. Did you point that out on the map just a minute ago? Did you point that out? A. No.

Q. Then will you show me on the map the traffic pattern?

A. The taxi pattern for 25-R is after the aircraft lands, to continue to the end and then turn down here (indicating).

Q. Now, is that what Mr. Scott did?

A. No. Mr. Scott —

The Court (Interposing): A little louder. The reporter, I think, is having difficulty in getting those questions and answers.

The Witness: Yes, sir. Mr. Scott made a left turn down runway 22.

Q. By Mr. Lillie: Instead of continuing down all the way to the end of that 25-R landing strip?

A. That is correct.

Q. All right, you may be seated, Mr. Buckles.

The next you heard from Mr. Scott, then, was when he was at the intersection of diagonal 22 and the main runway, is that correct? A. That is correct, yes.

Q. And that is your next entry, is it not? You cleared him across the main runway, as I think it is on page 3?

(Testimony of Robert E. Buckles)

A. Yes. That is the last communication I had with [135] that aircraft.

Q. How many aircraft did you have in the air at that time; do you know? Can you determine from your sheet?

A. Well, it would be rather hard to say. It varied. Sometimes we had as high as —

The Court (Interposing): No, no, just at that time.

The Witness: I don't remember at that particular time.

Q. By Mr. Lillie: Can you approximate how many?

A. I would approximate about six or seven, that is, in contact with me.

Q. Now, prior to this date had you during your period of work in control operation on this particular field had occasion to call for tows for other planes?

A. Yes, for a number of various reasons: for tests and disabled aircraft, and so forth.

Q. That is, where they were parked on a diagonal, is that correct? A. Yes.

Q. It was one of your duties to inform a taxiing plane that another plane was parked on a diagonal?

A. Well, there is no explicit duties prescribed for that. The traffic control division is just merely set up for traffic control.

Mr. Brewer: I am sorry, but I didn't hear that answer.

(Answer read by the reporter.) [136]

Q. By Mr. Lillie: Well, had you on previous occasions, and was it customary to, given them advance

(Testimony of Robert E. Buckles)

notice that a plane or an obstruction was on the runway when they were taxiing?

A. It wasn't necessarily customary. It was, well, it was in our — with respect to our division as to whether — well, let's see. How would I put this.

Q. Take your time and just tell in your own words what your duties were and what you did on those occasions.

A. Well, of course, we in traffic control, our main object was to attempt to prevent accidents. However, if in our minds, why, there wasn't any necessity for informing aircraft of any obstructions, and so forth, then we wouldn't do it. Of course, our air traffic came first.

Q. That is, your traffic in the air?

A. Our traffic in the air came first.

Q. Well, then, would you say it depended upon the circumstances of how much traffic was in the air with relation to what was proceeding on the ground?

A. Yes, that is correct. It would depend on that.

Q. To go one step further, if you had two calls to put out, one to a man in the air and one on the ground, would you have a preference?

A. Let's put it this way: If a man called for landing instructions and a man called for taxiing instructions, we [137] would give the man in the air first preference, yes.

Q. Where you were in the control tower, how far away was the scene of the accident, approximately?

A. That would be approximately one-half mile. It wouldn't be quite that; approximately three-eighths of a mile, I would say.

(Testimony of Robert E. Buckles)

Q. How soon after the accident did you have notice of it?

A. I didn't see the actual impact. It was just as the SBD was swung around.

Q. Could you see both planes? A. Yes.

Q. From three-eighths of a mile away?

A. Yes.

Q. Were they clearly visible?

A. Well, they were clearly visible. We couldn't see minute parts of the airplanes.

Q. But the plane itself was clearly visible?

A. Yes.

Mr. Lillie: That is all.

The Court: That is all, thank you.

Mr. Brewer: Just one question, your Honor.

The Court: I hope counsel will get this record and keep it straight. We have been back and forth three times. Proceed. [138]

Redirect Examination

By Mr. Brewer:

Q. Well, now, with reference to this taxi pattern, the P-51 should have been proceeding down the main runway to the end, also, should it not?

A. No. Each individual runway had a separate traffic—correction—taxi pattern; and for 25 main runway there was two separate exits. One was on diagonal 22 and also one on the end which you can plainly see. There was no need for limiting turns off the main runway because they were not going to taxi into any landing path.

(Testimony of Robert E. Buckles)

Q. Now, the traffic never moved on the ground there without permission and instructions from the tower, did it?

A. You can put it usually that they didn't.

Q. Sir? A. Usually not.

Q. However, the Douglas planes had been using that diagonal to cross the field, hadn't they?

The Court: That has been asked and answered.

Though it has been asked and answered, counsel, I shall permit him to answer again.

Mr. Brewer: All right. I don't recall.

The Witness: Yes. In that case we would say, "Navy such-and-such cleared to the ramp via the diagonal taxiway."

Q. By Mr. Brewer: These taxiing rules were subject to [139] variation by the tower, weren't they?

A. Yes, that is correct.

Q. And when you cleared Mr. Scott across the main runway you knew, of course, that he was using that variation and going down the diagonal ramp?

A. Yes. At that time I couldn't very well make him turn back and go into the traffic again.

Q. He could turn up the main runway at the end, couldn't he?

A. No. There was aircraft landing there. It was much quicker to get him across than it was to continue to the end.

Q. Now, in this traffic in the taxiing rules of the airport there was a rule against parking on the runways, too, was there not?

A. There was nothing in the field regulations, no.

(Testimony of Robert E. Buckles)

Q. There was nothing in the field regulations. That was controlled by the tower? A. Yes.

Q. North American had had these tows before of planes while testing?

A. Yes, at various times, yes.

Q. While testing this air pressure? A. Yes.

Q. You were aware of those tests going on, I suppose?

A. We were aware when they called up, yes. [140]

Mr. Brewer: That is all.

The Court: That is all, I hope.

(Witness excused.)

Mr. Lillie: I think this is Mr. Brewer's witness, your Honor, but I believe he may be excused.

The Court: Any further questions?

Mr. Brewer: No, your Honor.

The Court: All right, you may be excused.

Mr. Lillie: Thank you, your Honor.

Mr. Brewer: Mr. Christiansen.

ROBERT EDWARD CHRISTIANSEN

called as a witness by and in behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert Edward Christiansen.

The Clerk: How do you spell your last name?

The Witness: C-h-r-i-s-t-i-a-n-s-e-n.

The Clerk: Robert Edward Christiansen, C-h-r-i-s-t-i-a-n-s-e-n.

(Testimony of Robert Edward Christiansen)

Direct Examination

By Mr. Brewer:

Q. Where do you live, Mr. Christiansen?

A. 714 Cedar, Hawthorne.

Q. Speak just a little louder for us, will you, please?

A. 714 Cedar, Hawthorne, California. [141]

Q. By whom are you employed, Mr. Christiansen?

A. Douglas Aircraft.

Q. How long have you been employed by them?

A. Oh, since December 1939.

The Court: Are you still employed there?

The Witness: Yes.

The Court: All right.

Q. By Mr. Brewer: Now, were you present on the air field, Mines Field, when this accident happened Armistice Day 1943?

A. Yes, I was.

Q. Where were you located on the field at the time of the accident?

A. Well, we were approximately, oh, a hundred yards from the accident.

Q. What were you doing there?

A. Well, we were waiting for Mr. Scott to land.

Q. After he landed what was your plan? Were you going to work on the plane, or something like that?

A. Well, he was up for a check flight; and if the plane was all right, he would continue on into the hangar. And if it wasn't all right, why, we would park him right there at the end of the runway, rather on the ramp, where we were allowed to park our ships.

Q. Yes, sir? [142]

A. And continuing working on it and preparing it for another flight.

(Testimony of Robert Edward Christiansen)

Q. The ramp you speak of is the one in front of the administration building and these hangars?

A. No, out on the C line.

Q. Runway C? A. Yes.

Q. Were there other planes parked there similar to the SBD Mr. Scott was flying? A. Yes.

Q. Did you notice this Mustang P-51, when it landed and pulled up there?

A. Well, I didn't notice just when it landed; but I saw it after it had been stopped.

Q. You saw it after it was stopped. Did you continue to keep it more or less under your observation until the time of the accident?

A. Well, yes. When a ship stops like that on a taxi strip or on a runway, why, it just comes natural to kind of watch it and wonder what's wrong with it.

Q. Did you notice whether or not the engine was stopped? A. Yes, it was.

Q. What particular direction was it facing?

A. Well, he was facing in a southwesterly direction.

Q. Was it parallel with the runway 22, or S as it used [143] to be called?

A. Yes, it was. That is the diagonal.

Q. The diagonal? A. Yes.

Q. Now, this has been marked the approximate place where it was, this red mark here (indicating).

Does that meet with your approval and knowledge of it? A. Yes, that is pretty close, yes.

Q. Was it on the runway or off the runway?

A. It was on the runway.

Q. Did you observe the pilot in the Mustang?

A. Yes.

(Testimony of Robert Edward Christiansen)

Q. What did you see him do, if anything?

A. Well, it looked like he was talking over his radio. He had his hand up to his mouth as if he was using the microphone.

Q. All right. Now, how long did that Mustang stay there before the accident happened?

A. Oh, five, 10 minutes.

Q. Then did you see the accident itself, Mr. Christiansen? A. Yes.

Q. Did you see the SBD cross the main runway?

A. Yes.

Q. Will you describe its movements from the time it [144] started across the main runway right up until the time of the accident?

A. Well, I saw Mr. Scott when he stopped at that intersection at the main runway, and then he proceeded on across. When he got pretty close to the Mustang, I knew he hadn't seen it.

The Court: No, strike that out.

Q. By Mr. Brewer: Well, did Mr. Scott's plane go straight across the main runway? A. Yes.

Q. Did you notice it doing any S-ing at any time?

The Court: Now, counsel, please. This is your witness. These are all leading questions, but I have permitted them. Just ask him what he saw. Let him testify.

Q. By Mr. Brewer: Describe the progress of the plane up to the point of the accident.

The Court: That is right.

The Witness: Well, he didn't "S" across the main runway. I don't believe he S-ed it across the main runway, but I can't remember how many S-es or if he started

(Testimony of Robert Edward Christiansen)

any S-es after he started on the main runway. That is very vague in my memory.

Q. By Mr. Brewer: Did you go over to the scene of the accident? A. Yes.

Q. When you got there did you notice where the two [145] pilots were?

A. Well, the pilot in the Mustang was out of the aircraft wing and Tom was just crawling out, I believe.

The Court: You mean Mr. Scott?

The Witness: Mr. Scott. Pardon me.

Mr. Brewer: You may cross examine.

Cross Examination

By Mr. Lillie:

Q. I have only one question to ask you, Mr. Christiansen. That is, you stated that you were about a hundred yards away from the place where the accident occurred?

A. Yes.

Q. Would you come down and show me on the map approximately where you were?

A. Approximately in here (indicating).

Q. I see. I will just mark this "P-3" for the record.

You had watched the Army plane stop on the diagonal at the point indicated as "P-2"—pardon me—it is initialed an "X" by the initials "S.W.V." so that the spot is indicated as right here (indicating), is that correct? A. That is right.

Q. You had no difficulty in seeing the plane, did you?

A. No, I didn't.

Mr. Lillie: That is all.

Mr. Brewer: That is all. (Witness excused.) [146]

Mr. Brewer: Mr. Tybie.

ROBERT ANDREW TYBIE

called as a witness by and in behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert Andrew Tybie.

The Clerk: How do you spell your last name?

The Witness: T-y-b-i-e.

The Clerk: Robert Andrew Tybie, T-y-b-i-e.

Direct Examination

By Mr. Brewer:

Q. Where do you live, Mr. Tybie?

A. 8333 Grape Street, Los Angeles 1.

Q. By whom are you employed?

A. Douglas Aircraft.

Q. Were you so employed on November 11, 1943?

A. Yes.

Q. What was your job there at that time?

A. I was a field service mechanic.

Q. Were you employed out at the field, Mines Field, Los Angeles Municipal Airport? A. Yes.

Q. Do you know Mr. Scott here, the pilot of the SBD plane? A. Yes, I do. [147]

Q. What kind of work were you doing out there, sir?

A. I was working out on the flight line out on runway C. We spent all our time out on the line.

Q. Did you see this accident that we have been speaking about here in this trial? A. Yes, I did.

Q. Where were you located at the time and what were you doing?

A. I was located on the C line on the ramp, as they call it there, down right —

(Testimony of Robert Andrew Tybie)

The Court (Interposing): Go and indicate on the map for the jury.

The Witness (Continuing): — standing approximately right almost to the end of this right here, I would say 25 yards from the end of the runway there. (Indicating).

Q. By Mr. Brewer: You just mark it with a pencil, please. A. (Marking diagram)

Q. Right next to this "P-3" we will mark that "T-1" for the record.

What were you doing there, Mr. Tybie?

A. We was waiting for Mr. Scott to come in, and if he gave us an okay that the plane had been accepted, it was all right, we would direct him down this runway C and then he would come in to our hangar if it was okay. [148]

Q. You may resume the stand there, please.

Now, had you, before he landed noticed the Mustang, the P-51, out there on the field some place?

A. Yes. It was sitting there before he landed.

Q. Do you notice here a red mark which has been identified as "S.W.V." right here? (Indicating)

A. Yes.

Q. Is that approximately the place where the Mustang was parked or located? A. Yes.

Q. How long was that Mustang there before the accident?

A. Well, he had been there approximately 10 minutes.

Q. Did you notice whether or not the engine was dead, that is not running?

A. No, the engine was not running.

(Testimony of Robert Andrew Tybie)

Q. Did you notice anything the pilot did while you were watching him?

A. Well, yes. He evidently was calling someone on his radio because we could see him holding his mike to his lips.

Q. How far away was that Mustang from you, approximately?

A. Well, he was approximately a hundred yards.

Q. Did you observe the movements of Mr. Scott there on the field that day? A. Yes, I did. [149]

Q. After he landed? Will you just describe them to the court and jury, please?

A. Well, Mr. Scott landed on runway — let's see — 25-R, I believe; and he turned left on the diagonal and stopped at the main runway. He sat there a minute, probably; then he taxied across the main runway in a straight line across the main runway. After he had crossed the main runway, he started his S-ing immediately after he had crossed the main runway. And then he hit the Mustang that was parked on the runway.

Q. Could you tell from where you were approximately how far in on the main runway the Mustang was parked?

Well, withdraw that. You went over there afterwards, did you? A. Yes.

Q. Could you tell about what the position of the Mustang was there after the accident?

A. Well, the Mustang was — the whole plane was on the runway. The wing itself was on the asphalt. I would say the right main gear was approximately 20 feet from the edge of the runway.

Q. What do you mean by the "right main gear"?

A. The right main landing wheel.

(Testimony of Robert Andrew Tybie)

Q. The right landing wheel?

A. Yes. [150]

Q. Now, when the plane had crossed the main runway, do you recall how many S-es were made by the plane before the collision?

Mr. Lillie: That is objected to, your Honor, on the ground that it is leading.

The Court: Well, it is not quite leading. Of course, the better form of the direct question to one's own witness is, "Just describe what you saw with reference to the movements of the plane."

Then that avoids any question at all of its being leading.

Mr. Brewer: He has already mentioned the S-ing, your Honor.

The Court: All right. Just describe what you saw.

The Witness: Well, I couldn't say exactly how many S-es he did make.

Q. By Mr. Brewer: You went over to the planes, you said. Did you see the pilots there at the planes after the accident? A. Yes.

Q. Where were they?

A. Well, I don't recall exactly where they were when we first got there. I don't recall just exactly where they were.

Mr. Brewer: You may cross-examine. [151]

Cross Examination

By Mr. Lillie:

Q. Mr. Tybie, did you observe the plane that Mr. Scott was piloting when it first landed on 25-R?

A. Yes, I did.

(Testimony of Robert Andrew Tybie)

Q. Is that approximately "P-1" as marked on this map? A. Yes, that is pretty close.

Q. Then did you also observe him taxi down to P-2? Would you like to come down here and look at the map? It might help.

A. He taxied along here down to this — is this the main runway?

The Court: Yes.

Mr. Lillie: Yes.

The Witness: Down to the main runway and stopped.

Q. By Mr. Lillie: Did you observe him stop at P-2?

A. No.

Q. If you did, if he had stopped, would you remember it in view of the length of time?

A. Yes, I would.

Q. When he taxied from P-2, as indicated on the map, to the intersection of the diagonal 22 for the main runway, where it is marked "X," did he stop there?

A. Yes, he stopped at the edge of the main runway.

Q. What did he do, if anything, while he was stopped [152] there?

A. Well, I would say he just set there.

Q. Did you notice him turn to the east to watch a ship take off? A. No, I didn't.

Q. When he taxied from point "2" to the intersection of the diagonal and the main runway, did you observe whether or not in taxiing he made S turns?

A. Yes, he did.

Q. He made S turns all the way down?

A. Yes.

(Testimony of Robert Andrew Tybie)

Q. From point "P-2" to the intersection of the diagonal and the main runway? A. Yes.

Q. How long did he wait at the main runway?

A. I would say approximately a minute.

The Court: A little louder, witness.

The Witness: About a minute.

The Court: Your back is turned to the reporter.

Q. By Mr. Lillie: Now at this point, if you can—did you observe him cross that main runway?

A. Yes.

Mr. Lillie: May we have a red pencil? May I borrow it?

The Clerk: Yes.

Q. By Mr. Lillie: Would you be kind enough to draw [153] approximately—keeping in mind that this runway "F" is 150 feet wide—the position in relation to the width of runway "F" that he came out of this intersection here, which is the other side of the main runway?

A. Well— (Pause.)

Q. Do you understand my request? A. Yes.

Q. From this point, just draw a line from the one point to the other.

A. (Marking diagram.) He come straight across there just a little to the right of the center line.

Q. To the right. Now, by "to the right" you mean in this direction (indicating), is that correct?

A. Yes.

Q. Then he started his S turns, is that correct?

A. Yes.

(Testimony of Robert Andrew Tybie)

Q. Thank you. You testified you saw the Army plane parked on the diagonal when it came to rest with its motor stopped. The pilot appeared to be using a microphone or holding something up to his mouth, is that correct? A. Yes.

Q. You had no difficulty in making out and seeing the plane from a distance of a hundred yards, did you?

A. No.

Mr. Lillie: Thank you. That is all. [154]

Mr. Brewer: That is all.

The Court: That is all, thank you.

(Witness excused.)

Mr. Brewer: Mr. Bergren.

MORTIMER MILTON BERGREN

called as a witness by and behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Mortimer Milton Bergren.

The Clerk: How do you spell your last name?

The Witness: B-e-r-g-r-e-n

The Clerk: Mortimer Milton Bergren, B-e-r-g-r-e-n.

Direct Examination

By Mr. Brewer:

Q. Where do you live, Mr. Bergren?

A. 6215½ Heliotrope in Bell, California.

Q. By whom are you employed, sir?

A. The El Segundo Division of Douglas Aircraft.

(Testimony of Mortimer Milton Bergren)

Q. How long have you been employed by them?

A. Since September in 1942.

Q. What is your occupation with them there?

A. At the time of the accident I was assigned to instrumentation.

Q. In connection with your work were you present on the field, Mines field, Los Angeles Municipal Airport, when this [155] accident happened?

A. I was.

Q. What part of the field were you in, Mr. Bergren?

A. I was standing on what was called the front porch of the Douglas hangar.

Q. Will you step down to the diagram and indicate that with this red pencil?

This is the administration building marked in red and these three hangars (indicating).

A. Well, there is a portico or porch that runs along the front of this hangar. I would be in this approximate position, I would say (indicating).

Q. All right, thank you. I will mark that, if I may, "B-1."

Did you see the Mustang, the P-51, land and park in the vicinity there? A. Yes, I did.

Q. Was it at this point which has been testified to here (indicating)? Does that meet with your remembrance of it, the "X" I am pointing to?

A. Well, that would be a little hard to say for me. I was at a considerable distance from the airplane, and the relative position of the airplane on that ramp, I was

(Testimony of Mortimer Milton Bergren)

too close or too close to the ground to be able to identify exactly its position. [156]

Q. Did you go over there after the accident?

A. No, I did not.

Q. I see. All right. Now, did you see the Mustang come up there and stop? A. Yes, I did.

Q. You saw it stop there. How long was it there before the accident happened?

A. Well, I would estimate somewhere in the neighborhood of 10 minutes.

Q. Did you see Mr. Scott land?

A. Yes, I did.

Q. Did you observe his course, the course of his plane, from the place where he landed up to the collision?

A. I saw him land on 25-R and coast or taxi to the main runway where he stopped and then pause there and then continue on across the runway and then very shortly thereafter collide with the P-51.

Q. Now, will you tell us, did you observe the movements of the plane? Could you observe them where you were from the time he landed up until the time of the accident?

A. I don't remember whether I saw him fishtail or S turn. We got so used to seeing those planes make that maneuver on the ground that I probably just figured that he did anyway.

Q. You don't distinctly recall?

A. I don't remember whether he did. [157]

Mr. Brewer: You may cross examine.

(Testimony of Mortimer Milton Bergren)

Cross Examination

By Mr. Lillie:

Q. At the point from which you were standing, Mr. Bergren, you had no difficulty identifying the P-51 on the diagonal, did you?

A. No, I don't believe I did. We are so used to watching those planes over there that we spot them quite readily.

Q. You identified it as a P-51, didn't you?

A. When I watched him land, yes.

Q. Now, I might state that in respect to this "X" marked on the map, which is the position of the P-51, the Army plane, parked on the diagonal, it has been estimated by practically all the witnesses about a hundred feet from the southerly edge of the main runway.

There have also been some estimates made by two of the witnesses who have just testified prior to you that they were approximately 100 yards away from the place where the P-51 was parked. That is indicated on this map by two "X's" designated as "T-1" and "P-3."

Further, the control tower operator testified that he was approximately three-eighths of a mile from the point where the Army plane was parked.

Now, with that in mind, can you give me an idea of the distance, if those are correct distances in your mind in [158] relation to this map, how far away you were from the P-51 at the time it parked?

A. The control tower and the Douglas hangar are separated by a very short distance, and the Douglas han-

(Testimony of Mortimer Milton Bergren)

gar is a little further away from the P-51; but I don't have an idea how far.

My judge of distance wouldn't be that accurate.

Q. But in any event it is a little further away than the control tower itself? A. That's right.

Mr. Lillie: That is all. Thank you, Mr. Bergren.

Mr. Breyer: That is all.

(Witness excused.)

Mr. Brewer: Call Mr. Scott.

THOMAS W. SCOTT

called as a witness by and in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

The Clerk: Mr. Scott has been sworn.

The Court: He has been sworn previously.

By Mr. Brewer:

Q. Now, Mr. Scott, you have testified before here that you landed on that field many times before this accident.

In talking to the tower there, did the tower distinguish [159] in any way between instructions to continue on down the runways toward the north end of the field, or the west end of the field, or using the diagonals?

The Court: Repeat that question of counsel. Counsel is long-experienced and knows it is not in proper form.

Read the question.

(Testimony of Thomas W. Scott)

(Question read by the reporter.)

The Court: What instructions did you get from the tower at that time?

The Witness: Just that one day? To hold north of the runway.

The Court: Repeat that, Mr. Reporter.

(Answer read by the reporter.)

Q. By Mr. Brewer: I am not referring to that day, Mr. Scott. I am referring to prior occasions when you talked to the tower and they were directing you in the traffic pattern there.

A. Sometimes we would land on that runway. If there was a ship close behind us, they would tell us to continue down to the edge of the field and expedite our taxi. And other times they would tell us we could use the diagonal if we wanted to. And other times it was, as they said that day, to hold north of the runway.

Q. What did you understand that to mean, "hold north of the runway?" [160]

When this command was given to you, which has been read here, "(To SBD—Navy 302 cleared to the ramp. Hold north to the main runway.)"

What did you understand that to mean?

A. Just to be sure and not cross the runway until I received permission to.

Mr. Brewer: That is all:

Mr. Lillie: No questions, your Honor.

The Court: All right, that is all, thank you.

(Witness excused.)

Mr. Brewer: We rest, your Honor.

The Court: All right. Any rebuttal from the government?

Mr. Lillie: Pardon me, your Honor.

The Court: Any rebuttal?

Mr. Lillie: No rebuttal, your Honor.

The Court: We will take a short recess for the jury.

Ladies and gentlemen of the jury, we will take a short recess. You will remember the admonition I have heretofore given you not to discuss the matter among yourselves or permit anyone to discuss it in your presence. Do not form or express any opinion as to the merits of the controversy until it is finally submitted to you under the instructions of the court.

We will take a short recess for the present. You may be [161]

(Jury excused for recess.)

The Court: I have gone over the instructions, gentlemen.

Mr. Lillie: Before we start on those, may I direct the court's attention to the fact that the government at this time would like to make a motion.

The Court: All right.

Mr. Lillie: Does the court desire to take a recess first—

The Court: Let us go ahead.

Mr. Lillie: —and then argue the motion? All right.

If the court please, the government at this time will make a motion for a directed verdict.

The grounds and authorities for the motion are set out with particularity in our points and authorities submitted in support thereof.

In this case I should like to call the court's attention to the fact that there is no conflict in the facts that were presented to the court and the jury, in either the facts adduced by the evidence, by the government, or those set out and adduced by the evidence of the defendant Douglas Aircraft Corporation and the defendant Thomas W. Scott.

Ordinarily in a question of negligence it is one of fact to be determined by the jury. However, it is held (and I cite the cases) that where the undisputed evidence (and there is no dispute in the evidence here, except the actual act of [162] negligence) is of this character so conclusive that the court should, in the exercise of its discretion, set aside a verdict not in accord therewith. The question is one of law which warrants the court in directing a verdict.

Now, in that respect, if we narrow the facts down to their simplest form, we find that we have here a plane parked on a runway. There is approximately 100 or 120 to 125 feet of leeway or passage to one side of it;

That the operator, the defendant Scott, piloting the Douglas airplane, testified without any equivocation that he looked and did not see the plane;

That he was performing what he was required to perform, an "S" turn in an effort to see what was before him.

Now, I don't think there is any question with respect to the law in the court's mind that where one looks but

does not see what is in plain sight, he cannot be heard to say that he did not see. If he does, it is negligence.

The defendant in this action has attempted to set up negligence on the plaintiff or its agents and servants.

For the sake of argument we will admit that there was negligence; that there was negligence on the part of the control tower in not informing Mr. Scott, the defendant, that as he proceeded down that diagonal that there was parked there the plane of the plaintiff, the P-51.

We will go one step further and for the sake of argument [163] admit that the plane was illegally there; that it should not have been parked there.

The next question is a matter of law: What was the proximate cause of the accident?

Well, in the instant case we have the P-51 in a collision. It is not contributory negligence in itself because it was not the operating factor. The efficient cause of the accident was the failure of the pilot, Scott, after looking and not seeing the plane, which was in plain sight, continuing on and colliding with the aircraft of the plaintiff.

That was the only cause of the accident and the proximate cause of the accident.

On that ground, if the court please, I believe that the government is entitled to a directed verdict.

The Court: Motion denied, exception allowed.

Gentlemen, I have looked over the instructions.

Mr. Brewer: Is this the time to render any objections, your Honor, to the instructions?

The Court: Yes. I shall give you that opportunity when I come to them.

Mr. Brewer: Oh, yes. There was one of the government's to which I objected.

The Court: Yes. I shall take the defendant's instructions.

Mr. Brewer: I have them numbered at the bottom, your [164] Honor.

The Court: Yes. From No. 1 to No. 17 of the defendant's instructions are instructions that I always give.

I shall hear from the government, if they have any objection to Nos. 1 to 17.

Mr. Lillie: No objections, your Honor.

The Court: No, they are proper. Nos. 18 and 19; I do not find any objection to them. They are in a little different form, but I find no objection to 18 and 19 of the defendants.

I find no objection to 20 to 29 of the defendants.

Mr. Lillie: 20 and what was that, your Honor?

The Court: From 18 to 29, I find no objection.

Mr. Lillie: Is the court ready to hear my objection?

The Court: Yes.

Mr. Lillie: All right. On No. 18 the government will object on the ground that under the facts adduced, as a matter of law contributory negligence is not shown. That is as to No. 18.

The Court: Yes. That preserves your motion and your—

Mr. Lillie (Interposing): Yes, that is my objection on that ground.

The Court (Continuing): —and your statement, that is right. It will be given and exception allowed.

Mr. Lillie: The same objection to No. 19 on the same [165] ground.

The Court: Yes. No. 19 will be given and exception allowed.

Mr. Lillie: No objection to No. 20.

further ground that contributory negligence is not a complete statement of "contributory negligence" in the first line.

By that I mean, "contributory negligence is negligence upon the part of the party claiming damages or its agents . . . "

Now, that sentence is certainly incomplete. It is not a full statement of contributory negligence.

And the last sentence of the second paragraph:

"The reason for this rule of law is not that the fault of one party justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents . . . "

The causation is certainly argumentative. In substance, [168] if it were written out complete, as it should be, it would be a duplication of instructions 27 and 28.

Mr. Brewer: I might say, your Honor, that that is just a definition of "contributory negligence" as taken out of the cases, as taken out of the book with jury instructions and adapted to this case.

The Court: Yes: I think, counsel, if there is negligence on the part of the government in this case, that is one statement. I see no objection to a definition of "contributory negligence."

Mr. Lillie: Well, certainly that last sentence is argumentative, your Honor, in that paragraph. We have had previous to this in instruction 27 the same substance given, so that it is merely a duplication.

The Court: It has a repetition in No. 25 of the defendants.

Mr. Lillie: That is correct

The Court: If you will look at 25.

Mr. Lillie: In substance it is, your Honor.

The Court: Yes.

Mr. Lillie: It is a duplication.

The Court: Yes. Mr. Brewer, I think we have that pretty well covered in the other instructions, in 25 and 27.

I shall give the first sentence in defendants' No. 29. It is the opinion of the court that the sentence starting at [169] line 5, "Any person . . ." to the end at line 10 is duplication of other defendants' instructions.

Mr. Lillie: You are adding that onto which number?

The Court: I am not adding it onto anything. I am just striking it out, and I am giving the first sentence from lines 1 to 4.

Mr. Lillie: Is that a true statement of the law, your Honor, from lines 1 to 4?

The Court: It is, with the other statements in the instructions.

Mr. Lillie: As a matter of law, can we say, "contributory negligence is negligence upon the part of the party claiming damages or its agents"?

Mr. Brewer: It would have to be, it seems to me. That is a general statement of contributory negligence in personal injury. Of course, in this case it is different. It is damages.

The Court: Is that not correct, Mr. Lillie?

Mr. Lillie: Suppose the party did not act nor made no omission—

Mr. Brewer (Interposing): Well, this is just a definition for the jury of the term.

Mr. Lillie (Continuing): —is it contributory negligence?

The Court: It might be contributory negligence if the [170] jury believed that this plane was in an improper place for 10 minutes and that it was impossible for the other person to see it.

I do not know what conclusion they will come to.

Mr. Lillie: Yes, that is true, your Honor. But here is a statement of law.

The Court: Yes.

Mr. Lillie: "Contributory negligence is negligence upon the part of the party claiming damages or its agents which, cooperating in some degree with the negligence of another, helps in proximately causing the damage of which the former thereafter complains."

Mr. Brewer: I think that definition is given in many cases of contributory negligence. It is used in this book of approved jury instructions.

Mr. Lillie: There is one point I haven't brought out as yet: that in order for that to be correct, I think the court will either have to add that "contributory negligence is negligence upon the part of the party claiming damages or its agents, acting within the scope of their authority . . . "

The Court: There is no objection to that. It would have to be that.

Mr. Lillie: Because it would certainly be incomplete without it.

Mr. Brewer: There would be no objection to that. [171]

The Court: Now, wait a minute.

Now, go on Mr. Lillie:

Mr. Lillie: And then, " . . . in the furtherance of the master's business."

The Court: That would be acting within the scope—

Mr. Lillie (Interposing): I think it would be.

The Court (Continuing): —of his authority; then that would imply it was on his master's business.

Mr. Lillie: As to the second paragraph, your Honor—

The Court: No, that is out.

Mr. Lillie: Very well, your Honor.

The Court: Given as modified.

I notice, Mr. Brewer, this does not provide for any modification of the instructions. It says "Given" and "Refused."

Mr. Lillie: That's right. As I understood, your Honor, they no longer use that form. Is that correct?

The Court: "Modified"?

Mr. Lillie: No, as to putting down "Accepted," "Given," and "Modified."

The Court: Oh, yes.

Mr. Lillie: I understand some of the judges don't want that.

The Court: Right here now, for instance, an instruction we have modified: That always ought to be on there.

Oh, yes, gentlemen. I want to say, Mr. Brewer, I wish [172] other attorneys would prepare instructions as you have, instead of, as I usually get here, a hundred instructions, repeating and repeating different language, different cases. It is a great annoyance to the court. These principles are very simple.

Mr. Brewer: Yes, your Honor, they are.

The Court: They ought to be stated simply.

In a case I just concluded in New York they gave me 222 instructions on which to spend a few nights.

Mr. Brewer: 222? That is a record, isn't it?

The Court: 222 instruction! That is terrible, you know. But the court has to carefully consider, not only every instruction but every word in every instruction.

Now let us go to defendants' No. 28, gentlemen. Following that I have suggested this instruction:

"The defendant, Douglas Aircraft Company, Inc., is a corporation and as such can only act through its officers and employees who are its agents. The acts or omissions of an agent, done within the scope of his authority are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is."

Mr. Brewer: That is satisfactory.

The Court: Yes. That is a counterpart to your instruction and includes within it the suggestion Mr. Lillie made there: "... done within the scope of his authority . . . " [173]

Mr. Lillie: That is on—

The Court (Interposing): That would follow 28.

Mr. Lillie: Well, 28 I thought was denied, your Honor.

The Court: No.

Mr. Lillie: As being a duplication of 27.

Mr. Brewer: Yes, I think it was.

The Court: 27, I mean. Yes, you are right.

Mr. Lillie: That follows 27?

The Court: 27. You are right. I turned the wrong page.

The government's No. 1, I believe, is the same as the defendants' 13, is it not?

Mr. Lillie: That is correct, your Honor.

Mr. Brewer: Yes.

The Court: So I will give the defendants' No. 13.

The government's No. 2, I think, is the same as the defendants' 14.

Mr. Lillie: That is correct, your Honor.

The Court: I shall give the defendants' No. 14.

No. 3 on ordinary care is the same as the defendants' No. 16.

Mr. Lillie: Both must be the same jury instructions, your Honor, yes.

The Court: And No. 4, if you will please examine the one proposed by the government, is the same as defendants' 17. [174]

Mr. Brewer: Yes, I believe they are the same.

The Court: Would you check that, Mr. Lillie? I think it is the same.

Mr. Lillie: Yes, it is, your Honor.

The Court: Now, No. 5: I have a question mark after it.

Mr. Brewer: That is the one I wanted to object to because it did not include contributory negligence, your Honor.

The Court: Well, the objection I have to it is not that particularly but because we have not done it in the other instructions.

Here you specifically ask the court to instruct the jury as to the acts of one of the pilots in this case.

It appears to the court it is argumentative because the argument to the jury is going to be what this man did. Now you are asking the court, after specifically stating these different rules of negligence and ordinary care, and so forth, to tell the jury to pick out one of the pilots.

That is argumentative, gentlemen. I am going to deny it.

Mr. Brewer: I think No. 6 takes care of what he is trying to say anyway.

The Court: Yes, No. 6 is all right and I am going to give it. That was my next point here. 6 is all right, and 7 is all right.

Mr. Brewer: Yes, your Honor. I have no objection, except as to 5. [175]

Mr. Lillie: It didn't take long to settle those.

The Court: I want to say, gentlemen, that in all the time I have been on the bench I have never had as satisfactory instructions as have been handed to me here. It is a delight, as to both sides, to read these instructions.

I shall have to give these instructions now to the jury, gentlemen, and they will have to lunch and the government and the defendants will both have to divide the lunch fees.

How are you fixed, government?

Mr. Lillie: Oh, oh! I am "unfixed."

You know, we may not get any salaries for a while, Judge. You are cognizant of that fact, I know.

The Court: In a criminal case, of course, the government takes care of it. In all civil cases, where you have a jury, the expenses are divided.

I do not think you will have any difficulty in getting your half of it if the court makes an order.

Mr. Lillie: Well, I have no idea, your Honor. This is the first time I have run into it. Of course, you know also that they have no account. You cannot draw any money for expenses. We haven't been able to for about

30 or 40 days. I don't know whether the court has any difficulty, but you can't in our office.

Mr. Brewer: To save counsel embarrassment, your Honor, I [176] shall pay for the jury's lunch.

The Court: Of course, the jury will not know.

I will put it this way: Mr Brewer has been very fine about it and wants to get this case out of the way. Mr. Brewer will pay for it.

You make an application, Mr. Lillie, and state the position of the court: that the government should pay half of it and then remit it, if you can, to Mr. Brewer.

Mr. Brewer: That is very satisfactory.

The Court: We know how strict the rules of the government are. Of course, if the money is not there, if the appropriation is not there, even as a judge I cannot get it.

Mr. Lillie: May I have one minute, your Honor?

The Court: All right, we will take five minutes.

(Brief recess.)

Mr. Brewer: Do you want the time for argument, your Honor?

The Court: That is the next point, gentlemen.

Mr. Lillie: I think it will take me about 10 minutes to open and about 20 minutes to close.

The Court: Is a half-hour satisfactory to you?

Mr. Brewer: That is satisfactory.

The Court: All right, half an hour on both sides. That will be perfectly satisfactory, gentlemen, and it is going to relieve you of your payment for the jury's lunch because I [177] won't instruct them until after lunch.

Mr. Lillie: Oh, thank you very much.

Shall we give the oral argument until 12:30, then?

The Court: No, we cannot do that because the jury always have engagements at 12:00 o'clock, gentlemen.

Mr. Lillie: Well, shall we open our arguments?

The Court: Yes.

Mr. Lillie: I will take 10 minutes and then split the argument. Is that all right, your Honor?

The Court: Yes. You may take all of your 30 minutes in opening or all of it in closing, or you can split it any way you want to.

Mr. Lillie: Thank you, your Honor.

The Court: All right.

(The jury returned to the court room at 11:28 o'clock a. m.)

The Court: Mr. Cross, will you please keep time and give counsel on both sides a three-minute warning?

The Clerk: Yes, your Honor. Do you want 10 minutes?

Mr. Lillie: To open, yes.

The Court: Let the record show that the jury are present and counsel are in court for the plaintiff and the defendants.

We have agreed on an argument of half an hour on each side. The government will open, having the burden of proof, and the government may use all or any part of the 30 minutes [178] in opening and whatever remains they can use in closing. The defendants will speak between the opening and closing statements of the government and may use all of 30 minutes or any part of 30 minutes.

I recognize the government.

(Argument.) [179]

Court's Instructions to the Jury

The Court: Ladies and gentlemen of the jury, it becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as judges to follow the law as I shall state it to you.

On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose.

On the 11th day of December, 1946, there was filed in this court, in the District Court of the United States, in and for the Southern District of California, Central Division, an action wherein the United States of America is the plaintiff against the Douglas Aircraft Co., Inc., a corporation, and Thomas W. Scott, defendants. The case is No. 6074.

The issues are not difficult in the case. They are simple. I have read to you the complaint of the government and the answer of the defendants. I feel it is not necessary to read again the complaint and the answer unless counsel for the government or the defendants desire the complaint and answer to be read.

Government?

Mr. Lillie: No, your Honor.

Mr. Brewer: No, your Honor:

The Court: In every civil action, as in this one, the burden is on the plaintiff to prove his or her case by a preponderance [180] of the evidence, and the defendant must prove by a preponderance of the evidence its affirmative defenses.

General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it. When there is evidence to the effect

that one did look but did not see that which was in plain sight, it follows that that person was negligently inattentive.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplishes the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

The issues to be determined in this case are these:

First, Were the defendants negligent?

If your answer to that question is in the negative, you will return a verdict for the defendants. If your answer is in the affirmative, you have a second choice to determine, namely:

Was that negligence a proximate cause of the damage to the plaintiff.

If you answer that question in the negative, plaintiff is not entitled to recover; but if you answer it in the affirmative, [181] you then must find on a third question:

Was the plaintiff or any of its agents, servants or employees negligent?

If you find that they, the said agents, servants or employees of the plaintiff, were not negligent, after having found in plaintiff's favor on the other two issues, you must fix the amount of plaintiff's damages and return the verdict in its favor.

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If, however, you find that the plaintiff, the United States of America, or its agents, servants or employees, or either of them, were negligent then you must determine a fourth issue, namely:

Did that negligence contribute in any degree as the proximate cause of the accident?

If you find that it did, your verdict must be for the defendants. But if you find that it did not and you previously have found that there was negligence on defendants' part which proximately caused plaintiff's damage, you then must fix the amount of plaintiff's damages and return a verdict in its favor.

As indicated in these instructions, you should first determine the question of liability before you undertake to fix an amount that would compensate for damages found to have been suffered.

The burden is upon the plaintiff to prove by a preponderance [182] of the evidence that the defendants were negligent and that such negligence was the proximate cause of the damage to the plaintiff.

If the plaintiff has not fulfilled this burden, the defendants are entitled to your verdict and you need not consider the issue of contributory negligence.

If, however, plaintiff has fulfilled this burden as against the defendants, it is entitled to recover unless the defense of contributory negligence has been established under the court's instructions.

To establish this defense, the burden is upon the defendants to prove by a preponderance of evidence that the plaintiff through its agents, servants or employees was negligent and that such negligence contributed in

some degree as a proximate cause of the injury. If this burden has been fulfilled, the defendants are entitled to your verdict. If not fulfilled, your decision on this issue of contributory negligence must be in plaintiff's favor.

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

The law does not permit you to guess or to speculate as to the cause of the accident in question. If the evidence is equally balanced on the issues of negligence or proximate cause so that it does not preponderate in favor of the party [183] making the charge, then the party making that charge has failed to fulfill its burden of proof. To put the matter in another way, if after considering all the evidence you should find that it is just as probable that either of the defendants were not negligent or if they were their negligence was not a proximate cause of the accident, as it is that some negligence on their part was such a cause, then a case against the defendants has not been established.

By the same principle, it follows that if you should find that it is just as probable that plaintiff through its agents, servants or employees, was free from negligence, or even if negligent, that such negligence did not contribute as a proximate cause of the damage, as it is that negligence on the part of the plaintiff's agents, servants or employees did contribute as a proximate cause, then the defense of contributory negligence has not been established.

In determining whether negligence or proximate cause or contributory negligence has been proved by a pre-

ponderance of evidence, you should consider all the evidence bearing either way upon the question, regardless of who produced it. A party is entitled to the same benefit from evidence that favor its cause or defense when produced by its adversary as when produced by itself. Thus if evidence presented by the plaintiff itself should support a finding that it was guilty of contributory negligence, that finding would be adequately [184] supported, even if the defendant produced no additional evidence to the same effect. In like manner, the defendants' own evidence may show and support a finding of negligence on their part.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. This simply denotes an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it.

The law forbids you to attempt to classify negligence into degrees or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of proof or excuse. If you should find that there was negligent conduct on the part of more than one party, you are not to attempt to determine which was guilty of the greater negligence, with a view to delivering a verdict in favor of, or to favor in any way, the party whose conduct was the less reprehensible.

If you find that any party to this action was, or all were, negligent, you will follow the court's instructions, in determining whether or not liability should attach and do so without regard to how you might grade or

compare the [185] negligence involved if permitted to do so.

A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.

You are instructed that the United States of America being a governmental body can only act through its agents, servants and employees. Therefore, if you find in this case that some agent, servant or employee of the United States acting within the scope and purpose of his employment was negligent and if you further find that such negligence upon the part of such agent, servant or employee, if any, was a proximate cause of the damages claimed by the plaintiff, United States of America, then I instruct you that you shall find a verdict for the defendants.

The defendant Douglas Aircraft Company, Inc., is a corporation and as such can only act through its officers or [186] employees, who are its agents. The acts or omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is.

Contributory negligence is negligence upon the part of the party claiming damages or its agents acting within the scope of their authority which, cooperating in some degree with the negligence of another, helps in proximately causing the damage of which the former thereafter complains.

If adhering to the court's instructions you should find the plaintiff is entitled to a verdict against defendants it then will be your duty to award plaintiff such amount of damage as will compensate him reasonably for all detriment suffered by him and of which defendants' negligence as found by you was a proximate cause whether such detriment could have been anticipated or not.

The amount of damages alleged in the complaint for the repair of the airplane is \$10,590.55. This allegation is merely a claim. However, if you find from the evidence that the sum of \$10,590.55 is a reasonable value of the necessary expense for the repair of said airplane, then such is the measure of damages.

The term "preponderance of the evidence" is not a mere figure of speech, nor is to be lightly looked upon by the jury. It is a substantial right given by law that you cannot [187] render a verdict against a defendant unless the plaintiff has established his or her case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. If in your final estimate the evidence is equally balanced as between the plaintiff and the defendants, then the defendants are entitled to your verdict. On the other hand, any preponderance of the evidence in plaintiff's favor, however slight, that preponderance requires a verdict against the defendants.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof to prove his allegations by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty because such proof is rarely possible.

In a civil action, such as the one we are now trying, it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side and if it causes the jurors to believe that on that issue the probability of truth favors that party.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified [188] upon this trial.

In judging of the credibility of witnesses you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be repelled by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony or by evidence.

In judging the credibility of the witnesses in this case you may believe the whole or any part of the evidence of any witness or may disbelieve the whole or any part of it as may be dictated by your judgment as reasonable men and women.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he

bears to the parties to this action, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of [189] the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evi-

dence you shall believe that the probability of truth favors his testimony in other particulars.

Evidence may be either direct or indirect.

Direct evidence is that which proves a fact in dispute directly without an inference or presumption and which in itself, if true, conclusively establishes the fact. [190]

Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence.

Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect, but unless so controverted the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature.

The word "propensity," as used in this instruction, means any natural or habitual inclination or tendency.

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any [191] evidence offered and rejected or which has been stricken out by the court. Such evi-

dence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom as directed in my instructions and in accordance with the law as I state it to you.

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is merely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence or as to the credibility of the witness.

In admitting evidence to which an objection is made the court does not determine what weight should be given to such evidence. As to any offer of evidence that was rejected by the court, you, of course, must not consider the same. As to any question to which an objection was sustained, you *must conjecture* as to what the answer may have been or as to the reason for the objection.

In judging of the evidence you are to give it a reasonable and fair construction and you are not authorized because of any [192] feeling of sympathy or other bias to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended

by me and none should be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others; but you are to consider all the instructions as a whole and to regard each in the light of all the others.

You are instructed that if the judge has done or said anything which would suggest to you that I am *in* inclined to favor the claims or position of either party; you will not suffer yourself to be influenced by any such suggestion.

While the Federal Judges are permitted to comment upon the evidence, I have not done so. I have not expressed nor intended to express, nor have I intimated nor intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established or what inferences should be drawn from the evidence adduced.

If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

You must weigh and consider this case without regard to [193] sympathy or prejudice or passion for or against any party to this action.

The attitude of jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset his sense of pride may be aroused, and he may hesitate to recede from an announced position if and when shown that it is fallacious.

Remember that you are not partisans or advocates in this matter but you are judges. The final test of the quality of your service will lie in the verdict which you return to this court room and not in the opinions that any of you hold as you retire.

Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case.

To that end the court would remind you that in your deliberations in the juryroom there can be no triumph, excepting the assertion and declaration of the truth.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment.

To each of you I would say that you must decide the case [194] for yourself but should do so only after a consideration of the case with your fellow jurors. And you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Upon retiring to the juryroom you will select one of your number to act as foreman who will preside over your deliberations and who will sign the verdict to which you agree.

As soon as all of you shall have agreed upon a unanimous verdict, you shall have it signed and dated by your

foreman, and you shall then return with it into this court room.

Two forms of verdict will be handed to you:

"In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Douglas Aircraft Co., a corporation, and Thomas W. Scott, defendants.

"No. 6074-O'C.

"We, the jury in the above-entitled cause, find the issues in favor of the defendants.

"Dated: Los Angeles, California, May 14, 1947. [195]

"_____

Foreman of the Jury."

The other form of verdict is:

"In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Douglas Aircraft Co., a corporation, and Thomas W. Scott, defendants.

"No. 6074-O'C.

"Verdict of the Jury.

"We, the jury in the above-entitled cause, find the issues in favor of the plaintiff, and asses its damages in the sum of \$_____.

"Dated: Los Angeles, California, May 14, 1947.

"_____

Foreman of the Jury."

Swear the bailiffs.

Mr. Brewer: Your Honor, may I address the court a moment?

The Court: Yes.

Mr. Brewer: I was keeping track of these instructions. I may be wrong, but it seems through some inadvertence that Nos. 13, 14, 15 and 16 were not read.

The Court: Thank you very much. I shall examine them.

(Brief pause in the proceedings.)

The Court: Out of an abundance of caution I shall read [196]

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Negligence is not an absolute term but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are a part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, we ask:

"What conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances?"

Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skilfull one, but a person of reasonable [197] and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Ordinary care is not care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

The proximate cause of an injury is that cause which, in natural and continuous sequence, if unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

Swear the bailiffs.

(Whereupon, the bailiffs were duly sworn.)

(At 2:20 o'clock p. m., the jury retired to the jury room for deliberation.)

The Court: Will the attorneys check the exhibits now with the bailiff?

Court is in recess.

(Recess.)

(Whereupon, at 3:55 o'clock p. m., the jury returned to the court room.)

The Court: May I have the file, Mr. Cross? [198]

The Clerk: Yes, your Honor.

The Court: I shall read again the instruction with reference to damages.

The question of the jury is that "if the decision is in favor of the plaintiff, has the jury the authority to fix the amount of damages."

That is your exclusive province, ladies and gentlemen, to fix the measure of damages if you find for the plaintiff.

The second question: "if the jury decides that the evidence shows contributory negligence on the part of the plaintiff, in whose favor should the verdict be rendered according to the judge's instructions?"

The court's answer to that is that if you find that there was contributory negligence on the part of the plaintiff, the judgment then would be for the defendants.

You may retire and consider further your verdict.

(Whereupon, at 4:00 o'clock p. m. the jury retired from the court room.)

Mr. Lillie: If the court please, it might well be that the actual amount that was expended, if that was a reasonable amount, the figure—I imagine that was the problem in their mind.

The Court: Yes. Well, I gave them the instructions and gave them the amount.

Mr. Lillie: Originally. [199]

The Court: Originally, yes.

Mr. Lillie: I do not imagine they have any recollection as to the amount, and that was what the requested instruction was for.

The Court: Well, the only question they asked was if they had the right to fix the amount.

Mr. Lillie: Oh, I see.

The Court: So I said, "Yes."

Mr. Lillie: I see. Thank you.

The Court: Here it is:

"If the decision is in favor of the plaintiff, has the jury the authority to fix the amount of damages?"

Mr. Lillie: I beg your pardon. I didn't understand that.

The Court: So you can both get consolation and neither can get consolation under that.

Court is in recess.

(Recess.)

(Whereupon, at 4:50 o'clock p. m. the jury returned to the court room.)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

Juror Charles T. Pike (Foreman of the Jury): Yes, we have, your Honor.

The Court: Will you please hand it to the bailiff? [200]

(Brief pause in the proceedings.)

The Court: The clerk will read the verdict.

The Clerk (Reading): "In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Douglas Aircraft Company, Inc., a corporation, and Thomas W. Scott, defendants.

"No. 6074-O'C Civil

"Verdict of the jury.

"We, the jury in the above-entitled cause, find the issues in favor of the defendants.

"Dated Los Angeles, California, May 14, 1947.

"Signed: Chas. T. Pike, Foreman of the Jury."

The Court: Does either side wish the jury polled?

Mr. Lillie: No, your Honor.

Mr. Brewer: No, your Honor.

The Court: Ladies and gentlemen, you will be excused until further notified by the clerk to report for further duty. Thank you.

(Whereupon, at 4:53 o'clock p. m. the jury was excused and the hearing in the above-entitled matter closed.)

[Endorsed]: Filed Oct. 13, 1947. Edmund L. Smith, Clerk. [201]

[Endorsed]: No. 11759. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Douglas Aircraft Co., Inc., a corporation and Thomas W. Scott, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 16, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11759

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS AIRCRAFT CO., INC., a corporation, and
THOMAS W. SCOTT,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Points upon which appellant intends to rely on the appeal are as follows:

1. The Court erred in not granting plaintiff's motion for a directed verdict at the conclusion of the trial.
2. The Court erred in not finding as a matter of law that the plaintiff's acts did not constitute contributory negligence.
3. The Court erred in not finding as a matter of law that the proximate cause of plaintiff's damage was the negligence of the defendants.
4. The Court erred in permitting the cause to go to the jury.
5. The Court erred in not granting plaintiff's motion for judgment or a new trial.

6. The evidence does not sustain the verdict of the jury.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief, Civil Division

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorney for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct 16, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

AFFIDAVIT IN SUPPORT OF APPLICATION TO
BE RELIEVED FROM PRINTING AND RE-
PRODUCING EXHIBITS

State of California

County of Los Angeles—ss.

Cameron L. Lillie, Assistant United States Attorney,
being first duly sworn, deposes and says:

That as part of the records in the above-entitled case
there are as exhibits one large map and 47 photographs;

That due to the size of the map and the large number
of photographs which compose both the plaintiff's and
the defendants' exhibits your affiant believes that said
exhibits are not of printable type, for the reason that all
of the exhibits are photographs except for the one large
map and that the original photographs would be of more
assistance to the Court than an attempted reproduction

of said photographs printed on transcript paper. In addition thereto, that said exhibits are very voluminous and the cost of said reproduction would be excessive.

Your affiant therefore requests this Honorable Court to be relieved from having said exhibits printed and reproduced in the transcript and for the Court to consider said exhibits in their original form.

CAMERON L. LILLIE
Assistant United States Attorney

Subscribed and sworn to before me this 15th day of October, 1947.

(Seal) EDMUND L. SMITH
Clerk of the District Court, Southern District of
California

By Edw. F. Drew

Deputy

[Title of Circuit Court of Appeals and Cause]

ORDER

Upon reading the affidavit of Cameron L. Lillie, Assistant United States Attorney, and good cause appearing therefor

It Is Ordered that the appellant be relieved from having the exhibits printed and reproduced in the transcript and that said exhibits will be considered by said court in their original form without reproduction.

Dated: Oct. 16, 1947.

WILLIAM DENMAN
Judge, Circuit Court of Appeals

[Endorsed]: Filed Oct. 17, 1947. Paul P. O'Brien,
Clerk.